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THE
L A W
OF
T E N U R E S;
INCLUDING THE
THEORY AND PRACTICE
OF
C O P Y H O L D S.

By the late Lord Chief Baron GILBERT,

The FOURTH EDITION, Corrected;
WITH
An Historical Introduction on the FEUDAL SYSTEM,
And Copious NOTES and ILLUSTRATIONS,
By CHARLES WATKINS, ESQ.
Author of an ESSAY on the LAW of DESCENTS, &c.

L O N D O N :

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY.
FOR J. BUTTERWORTH, FLEET-STREET.

1796.



TO
THE HONOURABLE
Sir FRANCIS BULLER, Bart.

ONE OF THE JUSTICES OF
HIS MAJESTY'S COURT OF COMMON PLEAS,

THIS EDITION OF
THE TENURES OF GILBERT

IS
(WITH PERMISSION)

MOST RESPECTFULLY INSCRIBED,

BY
HIS OBLIGED AND

OBEDIENT SERVANT,

CHARLES WATKINS.

LONDON;
EASTER TERM, 1796.



ADVERTISEMENT.

THE former Editions of the **TENURES OF GILBERT** having become extremely scarce, it is conceived that no apology can be requisite for presenting a new one to the world. The deservedly high estimation in which the original has been so long held, must equally render unnecessary any eulogium which an Advertisement can bestow: It remains therefore only to say, that the present Editor has been anxious to add to the utility of the Work; and, by pointing out more immediately the principles on which the doctrines advanced are established, and by the addition of references, to enable the Student more easily to pursue his researches.

The present Editor embraces, with much pleasure, the opportunity thus afforded him, of acknowledging the obligation which he owes to the friendship and politeness of Mr. HARGRAVE, for his
kind

kind communication of the Chief Baron's *Manuscript* "HISTORY OF THE FEUD," which is in the Possession of that Gentleman. From that Manuscript, the Editor has been enabled to correct many passages in the "Treatise on Tenures," and to enrich his pages with some observations of the very learned Author, with which, till now, the Profession has not been presented.

The Editor is sorry that he was not enabled to correct the whole of the text:— But he remembered the inviolability which the sacredness of the Author's work must ever demand. The inaccuracies which occur must be rather lamented than condemned, when it is considered that the work was posthumous; and that the ingenious Author was frequently incapacitated, during many of his latter years, to write himself, and, in consequence, obliged to trust to his clerks for the faithful communication of what he could only dictate.

Some few Notes were added to the third edition, which have been preserved;
and

and from which those of the present Editor are distinguished by being inserted between crotchets. The Side References also remain (except in a very few instances) as they were given in the last edition; and for the accuracy of which the present Editor cannot, therefore, be answerable.

It has been remarked, that “ the sparks
“ of all the sciences in the world are
“ raked up in the ashes of the law” (*Finche*
L. b. 1. c. 3.): Yet the study of it has been
rendered disgusting by the confined manner
in which it has been treated. When
the laws are connected with the history
and manners of the times, they at once
interest and amuse; we develop their
principles with admiration, and we trace
their progress with pleasure. The amplitude
and liberality of sentiment which
our Author displayed in deducing those
principles, and in marking that progress,
should be equally our imitation, as they
have so truly been deserving the celebrity
they have received.



INTRODUCTION.

“THE first advance,” says Falconer (a), “from a savage state towards civilization is when people leave off their mode of gaining subsistence by hunting or fishing, and betake themselves to pasturage and feeding cattle.” We trace back the history of all civilized nations to this state of manners and mode of life (b); and in this state of manners, and in this mode of life, are nations still seen to exist (c). Man, dependent upon his

(a) *On Climate*, b. vi. c. 2. p. 322. 4to.

(b) See *Stuart's Diff. on Antiq. Engl. Const.* p. 1. f. 3. *Dalrymple on Feud. Prop.* c. 3. f. 1. 2 *Blackst. Comm.* c. 1. *Ferguson on Civ. Soc.* p. 2. f. 2.

(c) As the *Tartars*, *Arabs*, &c.

The author must here remark, that he does not refer to the writings of a *Stuart* or a *Sullivan*, &c. merely as authorities in support of what he advances in the course of this Introduction, or of the following Notes, but with a view of assisting the reader in his researches. In those writings he will find the subjects, which can here only be hinted at, pursued with an industry, and treated on with an elegance and perspicuity, that will amply compensate him for his trouble in consulting them. They are books, too, which are in most persons possession, or which may be easily procured; and if he is inclined to pursue his researches further, he will in those works be abundantly supplied with references to earlier productions.

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flocks and his herds for subsistence, seeks the irriguous plain :—he finds it unoccupied ; and, consequently, conceives himself entitled to the herbage it yields. While it is not already possessed by another, another he thinks can have no greater right than himself :—the right which he considers as belonging to others, he enjoys in common with them ; but he perceives that he has a right which exclusively belongs to himself, by reason of the occupancy he has gained. This right he maintains against all his opposers while the possession is worth its defence. When the produce of the spot he selected is exhausted, he quits that possession, and leaves it to be occupied by the next who comes.

Still advancing in his progress towards refinement, man feels an increase of wants, which, by his art and industry, he endeavours to supply. He finds the spontaneous productions of the earth inadequate to this end ; and that even those spontaneous productions call for the protection of his arm, which can only be rendered them while they continue in his immediate possession. He cares not to depend upon the fruit which another may gather before him, or on the grain which even his own herd may destroy. Urged by considerations like these, he selects the spot which another has not occupied : he furthers its fertility by his cultivation, defends its advancing produce, and at length enjoys the fruits of his labour and
care.

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care. His attentions confined to the chosen spot, he himself becomes stationary and fixed. He before roved with his herd in search of the distant pasture; but he now foregoes his tent or his waggon, and erects a permanent dwelling on the piece he has selected to improve. Here he exerts his arm, and here his affections are centered. The grain which ripens in his presence, by himself was nourished and sown. His habitation had yielded him protection and peace, and was the scene of his varied joys. Possessions thus formed, as it were, by himself, he considers as peculiarly *his*; and the justice of his claim was apparent. To others of equal industry an equal spot might belong; the world but thinly inhabited, another was not injured by the enjoyment of the portion he chose. To this spot he conceived no other could have claim:—and he enjoyed it as the gift of heaven.

The feelings and the necessities of man alike urge him to social intercourse. The depredations of other individuals render requisite a mutual defence. Persons exposed separately to danger, become leagued for a general support. Families unite in reciprocal assistance, and a confederacy is established and a nation formed. The society thus composed is separated from others, and the limits of its possessions prescribed. The relations of that society are distinguished from the relations of individuals, who regard themselves but as parts of a whole.

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Many of these small societies, finding the industry of the individual inadequate to the cultivation of the ground, as well as the strength of a single arm insufficient for its defence, assemble the people together, and cultivate the earth in common. The whole society unite in the cultivation of the soil, and to the whole society does its produce belong. Each of its members contributed to till and to sow, and each is entitled to his portion of the future harvest. The property, even of such produce, (and more especially of the soil itself) was supposed to be, till actually distributed, in the state or society at large:—the individual was only entitled to his share of the fruits when gathered, or of the grain when lodged in their stores (*d*).

The

(*d*) “ Among several nations of Indians, each town usually works together : previous thereto, an old beloved man warns the inhabitants to be ready to plant on a prefixed day. At the dawn of it, one by order goes aloft, and whoops to them with shrill calls, ‘ That the new year is far advanced ; that he who expects to eat must work ; that he who will not work must pay the fine according to old custom, or leave the town,’ &c. At such times may be seen many war-chieftains working in common with the people. About an hour after sunrise, they enter the field agreed on by lot, and fall to work with great cheerfulness. Sometimes one of their orators cheers them with jests and humorous old tales, and sings several of their most agreeable wild tunes, beating also with a stick in his right hand on the top of an earthen pot covered with a wet and well-stretched deer-skin. Thus they

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The Gothic nations improved this idea:—Origin of the
feudal system.
with them the property of the soil was vested in the society, the nation, or tribe; but they did not cultivate the earth in common. A portion was separately assigned to the individual entitled, who tilled, and enjoyed its produce. When the harvest was gathered, his title to it seems to have ceased, and it returned again to the state. In the then state of agriculture, the soil required but little preparation; and, previously to the following seed-time, a new distribution was made (*e*); and a system very similar to this appears once to have obtained among our Celtic progenitors (*f*).

The Germans had long been in the practice of making incursions into the neighbouring states under leaders of their own selection. They sometimes returned and divided their spoil, and often settled in the countries they

they proceed from field to field till their seed is sown." See *Adair's Amer. Ind.* 406. 430. *Ferguson on Civil Soc.* pt. 2. f. 2. *Linschot.* b. 2. p. 219—221. *Arist. Polit.* c. 3. *Stuart's Diff.* pt. 1. f. 3. p. 32. n. (9). *View of Soc. in Eur.* b. 1. c. 1. f. 1. p. 152.

(*e*) *Tacitus de Morib. Germ.* cap. 26. & vide *Cæs. de Bello Gall.* lib. iv. c. 2. & lib. vi. c. 20. *Stuart's View,* b. 1. c. 1. f. 1. & c. 2. f. 1. and notes. *Diff.* p. 1. f. 3. *Sulliv. Lect.* 4. *Post.* 2, (*a*).

(*f*) *Davy's Rep.* 28. b. &c. 49. a. &c. *Camd. Brit.* t. *Cust. of the Irish*; and see 1 *Whit. Manch.* c. 8. f. 3. 1 *Warr. Wales,* b. 3. p. 186, &c. b. 4. p. 246. *Tayl. en Gavelk. passim.*

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had conquered. At length, however, the Gothic tribes, as by concert, forsook their native forests, and, over-running the more southern provinces of Europe, established themselves on the ruins of the Roman power.

As those barbarous nations were derived from a common source, the governments which they founded, and the customs which regulated their conduct, were as similar to each other as they were different from the forms of polity of other states.

They were originally a free and a brave people, and their conceptions of liberty and glory they religiously preserved. The ultimate property of the soil, and the source of political authority, were considered by them as vested in the society at large; they were careful of individual freedom, and consequently jealous of individual power. When they abdicated their native lands and fought for new habitations, each emigrating body of people was a well regulated army. The freeman, though conscious of his own importance, and sensible of his own claim to a share in the lands which his sword should contribute to conquer, paid a willing and faithful obedience to his immediate chieftain; and the respective chiefs were equally subordinate to the heretoch, or general, who conducted them.

When they settled in the countries they had subdued, subordination was seen to be as essential

tial as when they had marched in pursuit of their spoil. The freedom of the individual was also supported: the authority he acknowledged was not the will of a tyrant, but the voice of the nation of which he himself was a part. The subordination established was not for the aggrandizement of a particular person, but for the common good and the general defence (g).

The

(g) “ *J’ai toujours été choqué de ce mécompt de nos historiens, qui, sans en excepter aucun, ont manqué à cet égard d’exactitude & de fidélité des le principe; en effet, c’est à ce titre le plus abusif qui puisse être imaginé, qu’il faut rapporter l’idée commune, qui fait regarder la Gaule, & à présent la France, comme le patrimoine de Clovis & de ses successeurs: OU NE SE SOUVIENT PLUS QUE, DANS L’ORIGINE, CLOVIS N’ETOIT QUE LE GENERAL D’UNE ARMÉE LIBRE, QUI L’AVOIT ELU POUR LA CONDUIRE DANS DES ENTREPRISES DONT LA GLOIRE ET LE PROFIT DEVOIENT ÊTRE COMMUNS.*” *Boulainvilliers Mem. Historiques*, 15. Again he says, “ *Dans le premier état (upon the conquest of Gaul, under the first race of their kings) j’ai fait voir qu’une nation entière, qui s’est déterminée à changer le pais de sa naissance, & à faire une conquête au risque de se perdre elle-même, n’a jamais pu consider l’établissement personnel de son roi, comme son objet principal; il est vrai néanmoins, que le succès d’une telle entreprise n’a pu lui devenir favorable, sans que le roi en ait le profit principal, outre la gloire de la conduite; mais que la nation ait renoncé, ou même qu’elle pu renoncer à son droit sur les terres qu’elle s’est acquise, & qu’elle a partagées, dans la seule idée de donner à ce roi, ou à ses successeurs, un pouvoir illimité, dont il ne lui reviendrait d’autre avantage que la gloire d’obéir, c’est non seulement ce qui n’a pas été fait, mais qu’il étoit impossible de faire, ou d’imaginer,*” &c. *Ibid.* 179. See *Squire, Ang.*

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The nation or tribe in its predatory progress was an assemblage of soldiers whose glory was in arms; and an assemblage of soldiers was it to continue, though it became stationed in the country it had gained. "A feudal kingdom," says Dr. *Robertson* (*b*), "was properly an encampment of a great army. Military ideas predominated; military subordination was established; and the possession of land was the pay which the soldiers received for their personal service."

Their heretoch, or general, though elective, became permanent as the danger was permanent against which he was elected to contend.

Sax. Gov. f. 66. n. (3); & f. 70. n. (2). See also *De St. Remy. Memoirs*: pref. "Ils aimoient la liberté, et ne pouvoient qu'avec peine souffrir la domination même des princes de leur nation. Ils éliſoient eux-mêmes leur magistrats, & leurs rois, qu'ils changeoient tous les ans, de crainte que quelqu'un n'usurpât trop d'autorité." *De St. Remy. Mem.* tom. 1. Livre premier, p. 13. &c. "Tout ce vaste pays (the north of Germany) étoit devisé par Canton soumis à une infinité de petits princes ou ducs. Plusieurs ou quelquefois tous ces souverains s'unissoient pour faire la guerre & des invasions sur les terres des peuples voisins; alors ils éliſoient un général auquel ils donnoient le nom & l'autorité de roi tout le tems qu'ils marchaient sous ses ordres." *Abrégé Chron. de l'Histoire du Nord. par M. Lacombe*, tom. 1. *Hist. de Dannemarc*, an. 772. p. 49.

(*b*) 1 *Hist. of Scotl.* 16. c. 1. and see 1 *Hist. of Cha. V.* f. 1. p. 16, 17. *West on the Creation of Peers*, 1, &c. See the quotation from *Leysen* in *Wright on Ten.* 9. n. (t). *Law of Forfeiture for High Treason*, 45, &c. *Gilh. MS. Hist. of the Feud.*

This

This permanency, and the necessity of his continual exertion, increased his importance in the view of others : still, however, he was only the representative of the state. The country was portioned out like the military authority ; those portions were allotted to certain individuals who acknowledged a subordination to others who again held their portion of their superiors, who, in their turns, acknowledged the supremacy of the chief.

The property of the soil and the source of power were vested in the society ; but as the chief represented that society, the property of the soil, and the source of power, became vested in the chief. Hence every individual who was entitled to a portion of territory was said to hold either mediately or immediately of him (*i*) ; and hence also was he deemed the fountain of justice.

A tribe, therefore, possessing a tract of conquered country, reserved a part of it for the purposes of the state, which was denominated the *fisc* or *demesnes*. This the king or chief enjoyed, as the representative of the nation, in his political capacity (*k*) ; the other part was

Distribution of
lands.

(*i*) *Post.* 2, (*c*).

(*k*) There are some observations on this capacity of the king, which greatly merit the consideration of the reader, in the *Law of Forfeiture for High Treason*, p. 52, &c. ; and see also *De Lolme on the Const. of Engl.* b. 1. c. 1. p. 10, &c.

divided

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divided among the great personages who attended him in his expedition. Those personages conquered for themselves as well as for their leader, and they considered the portions allotted them not strictly as gratuities, but as their due (*l*).

Those

(*l*) When William duke of Normandy expressed his intention to invade England, his people told him that though very possibly his claim might be justly founded, yet they were not obliged to assist him in gaining its crown:—that they were not bound to serve him in foreign wars. He was, therefore, obliged to have recourse to supplication; for he could not command. He promised a share of lands as a compensation for services. The assistance which he obtained was voluntary, and given him with a view to the possessions which they afterwards received. The number of ships which the nobles supplied are mentioned in a manuscript transcribed by *Taylor* at the end of his *Hist. of Gavelk*. The rewards too which they actually received were most ample:—the earl of Moreton, and afterwards of Cornwall in England, had no less than 793 manors given him; but he had contributed to the expedition no less than 120 ships. Others were rewarded proportionally; their shares are enumerated in the histories of *Rapin*, *Hume*, &c., and are mentioned also in an *Essay on the Polity of Engl.* 476. n. (N N). *West on Peers*, 20. *Sulliv.* L. 17. p. 162, &c.

The earl of Surry did not scruple to affirm in the time of Edward the first, that his ancestors had assisted William in gaining England, and were equally entitled to their share of the spoil. And, in answer to a *quo warranto* issued by Edward, he declared that it was by *their* swords that his ancestors had obtained their lands, and that by *his* would he maintain his right. See *West*, 20, 21. *Owen's British Remains*, 18, 19. *Hist. of the Lord Marchers*; and see

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Those who held their territories immediately from the crown were said to hold *in capite*; but those who held *in capite* had other chiefs, or lords, or barons, subordinate to them: they also granted to hold of themselves. These intermediate persons were denominated the *mesne* lords, of whom so much is spoken in our laws. Even these divided their lands among their followers; and every lordship or manor was itself the similitude of the kingdom at large. The lord divided his manor, as the state had divided the kingdom, into two parts: the one he retained for his own support, and was partly cultivated by his villeins and copyholders, and was called his demefnes (*m*); the other part was parcelled out among his dependants, who returned him their services. “A feudal kingdom,” says *West* (*n*), “is to be considered no otherwise than as one great feigniory or dominion, of which the king is the chief lord.”

Camd. Brit. Introd. Norm. clvii. 1 *Tyrr.* b. 6. p. 108. *Dr. Squire, Anglo-Sax. Gov.* f. 38, 39, &c. 60, 70, &c. 1 *Rob. Scotl.* c. 1. p. 15. *Charles V.* f. 1. p. 14. and notes, 256. n. (H). *Stuart's Diff.* p. 3. f. 2. p. 137. n. (6). *De Lolme*, b. 1. c. 1. p. 10, 11. *De St. Remy. Memoires*, tom. 1. pref. f. 14, &c.; and livre ii. p. 86. See, of the Spanish invaders of Peru, 1 *Rob. Amer.* b. 6. p. 258. 4to. ed.

(*m*) See 1 *Lord Raym.* 43, 4. 2 *ibid.* 1225. 1 *Salk.* 186.

(*n*) On *Peers*, 2—10.; and see 1 *Mad. Excheq.* c. 1. p. 2, 3. *Kaims's Brit. Antiq.* 26. and 1 *Rob. Scotl.* b. 1. p. 77.

We

Jurisdiction of
the barons.

We have already observed that the king was the origin of judicial power as the representative of the nation. The lord had a jurisdiction also commensurate with his territory. This extended often to life and limb, and by consequence to the power of pardoning; and the power of pardoning was not even here wholly at an end till the time of Henry the eighth (*o*). The lord was also chancellor in his court, and had an equitable as well as a legal authority (*p*). He, too, like his king, had his officers of state, and his hall was attended like the court of his chief (*q*). The impartial administration of justice was carefully provided for; it was not the caprice of their lord, but the sentence of their peers that they obeyed. Each was the judge of

(*o*) See the *Stat. 27 Hen. 8. c. 24.*

(*p*) *Post. 48, (a); 209, (d); 210, &c. 309, &c. See Kaims's Eff. on Brit. Ant. Eff. 2. Dalrymple, F. P. c. 7. f. 1. p. 270. Squire, f. 54, &c. 1 Rob. Cha. V. f. 1. p. 67, &c. and n. (Z). Stuart's View, b. 1. c. 2. f. 3. p. 38, and 246, &c.*

(*q*) See *Stu. Diff. p. 3. f. 3. p. 163. n. (20). Squire, f. 53. n. (1). 1 Mad. Excheq. c. 3. p. 107, &c. Formul. Angl. No 2, &c. Mad. Baron. Anglica, b. 1. c. 6. p. 133, &c. St. Palaye, p. 4, &c.*

The house of peers was the court-baron of the kingdom: and see *West. 10, &c. Kaims's Eff. ii. p. 25. 1 Rob. Cha. V. f. 1. p. 43.*; and see also *Camd. Brit. t. Cheshire and Glamorganshire, of the courts of the earls of those territories.*

his equals, and each by his equals was judged (*r*). As tenants they were bound to preserve the rights of their lord, and inform him of their being infringed. They were jealous also of his power, and carefully guarded their own. Hence the suit of court was inseparably annexed to the feud (*s*).

Thus we see that the kingdom was parcelled out, and each proprietor held of another in a regular subordination as he had done with respect to his military capacity in the army; for still were his military obligations existing. The connections between the foldier and his general, the tenant and his lord, were not confined to themselves; they had a respect to the whole society; the public was interested, and the whole institution of feudalism was national,—was enlarged (*t*).

This connection between the lord and tenant was intimate, and originated in benevolence and gratitude: the consequent obligations were mu-

The obligations of the lord and tenant were reciprocal.

(*r*) *Magna Charta*, c. 14 & 29; and see *Stuart's Diff.* p. 4. f. 4. p. 262. n. (6). *Wright*, 196. n. (*i*); and *Post.* 210, (*a*).

The Count de Boulainvilliers, (*Mem. Historiques*, p. 19.) when enumerating the privileges of the freemen, mentions, “*Le droit de juger ses pareils, et de ne pouvoir être jugé que par eux en matiere criminelle*,” &c. See *Squire, Anglo-Sax. Gov.* f. 60. n. (2).

(*s*) *Post.* 210, (*a*); 324, (*b*).

(*t*) See *Law of Forfeiture*. 45. 52, &c. *Co. Litt.* 75. 2 *Inst.* 597. *Wright on Ten.* 9. 10. 20. 27. 41. 64. n. (*g*); 68. n. (*w*). *Stu View*, *passim*.

tual.

Attornment.

Fines for alienation.

tual. The tenant was dependant upon his lord, but the lord was beholding in his turn to the tenant. Hence the reciprocity of their engagements (*u*). The lord could not alien his seigniory without the consent of his tenant; and hence the ceremony of attornment (*x*). The tenant, on the other hand, could not alien his feud without the concurrence of the lord (*y*). The connection was founded on personal services, and on personal attachments. This connection relaxed, and the lord consented to the transfer; or, by means of a present, his reluctance was done away: and hence came fines on alienation (*z*). It would have been incongruous with the liberty in which this system originated, but which, alas! was forgotten in later days, to introduce a stranger into the tenancy without the consent of the lord, or to subject a freeman to a superior whom he did not choose to obey. Hence also was possession delivered, and the tenant admitted, in the most public manner,

(*u*) *Law of Forfeiture*. 46, &c. *Wright*, 12, n. (*a*); 30. 37. 42, &c. 67, and n. (*s*); 145, n. (*a*). *Stu. View*, b. 1. c. 2. f. 1. n. (8), p. 213. b. 2. c. 1. f. 2. and n. (3), p. 317. and *Post*. 50. 81. 133. 151.

"The old way of feoffing for homage and service," says *Madox*, "was an excellent means to unite and consociate men together. Thus a great lord and his franktenants by chivalry were in a sort all of one family." *Baronia Anglica*, b. 3. c. 6. p. 280.

(*x*) *Post*. 50 & 81. (y) *Post*. 50.

(*z*) *Post*. 50, and n. (*c*); 51, (*a*).

coram

coram paribus; not only for evidencing the transfer or gift, but for the information of those who were already received into the tenancy (a).

By accepting the feud, the tenant was bound ^{Services.} to perform the stipulated services and returns (b); to accompany his lord to battle or to cultivate his lands, and to attend his courts of justice or state. On such acceptance, he promised to be faithful and true: hence arose fealty and ^{Fealty, &c.} homage. When the lord accepted the homage of his tenant, he also was bound to warranty ^{Warranty.} and defence (c).

In Germany, feuds were annual only; an attention to agriculture would have withdrawn

(a) *Post.* 39, (a); 250, (c).

(b) Those services and returns were in after times divided into *feudal* and *extra feudal*: the former were those flowing of necessity from the nature of the tenancy, as fealty, defence, and suit of court; the latter were such as were expressly stipulated in the grant; and the king or lord could impose or require no farther returns. When Edward the first ordered the earls of Hereford and Norfolk to go over with his army into Guienne, they replied that the tenure of their lands did not oblige them do so, unless his majesty went in person. The king insisted on the thing: the earls were firm. "By God, sir earl," said Edward to Hereford, "you shall either go or hang."—"By God, sir king," replied the earl, "I will neither go nor hang." The king submitted, and forgave their warmth. *Stat.* 34 *Ed.* 1. *§.* 4. c. 5. 2 *In§.* 47, 48, and 536. 3 *Tyrr.* 106. *West.* 7. *Sulliv.* 70. *L.* 7. *Camd. Brit.* *Intro.* clvii. *Rapin, Henry, &c.* *sub an.* 1280.

(c) *Post.* 133, (a).

them

Feuds become
for life, &c.

Descendible.

Seisin given to
the heir.

them from warlike enterprizes (*d*). When they became settled, the reason in some measure ceased, and feuds were conferred for life (*e*); they were then extended to the sons of the tenant. The division however of them was inimical to the end of the institution, as it divided the strength of the tenancy; the individual therefore was to succeed when feuds were permitted to descend. The lord then chose the son which he conceived the best adapted to the discharge of the returns (*f*); the eldest generally became the first enabled to render them, and the right of primogeniture was at length established (*g*). Women, being incapable of discharging the feudal duties, were of consequence precluded from the fief (*b*).

Still, however, though the heir succeeded, yet he received his feud rather as a gratuity than as a due. He was regularly accepted as a tenant by the lord, and he acknowledged his obligation for the renewal of the grant. On the death of a tenant, as the services ceased, the lord took possession of the feud. He made proclamation for the heir to claim; and if he did so within the time prescribed, he relin-

(*d*) *Vide Cæsar de Bello Gall.* lib. vi. c. 20. *Watk. on Desc.* c. 3. s. 1. p. 103.

(*e*) *Post.* 2, (*a*).

(*g*) *Post.* 11, (*b*).

(*f*) *Post.* 11, (*b*).

(*b*) *Post.* 11, (*a*).

quished the possession to him (*i*). Hence the incidents of heriots, reliefs, primer seisin, &c.

In soccage tenures, indeed, the division of the feud was not productive of the mischiefs which took place with respect to military tenancies; hence those in soccage descended to *all* the sons till a later period. At length, however, in imitation of the military feuds, they went to the eldest alone (*k*).

If the heir was an infant at the death of his ^{Wardship} ancestor who held by knight-service, the lord took him under his protection, and educated him in military arts (*l*). If in soccage, his relations brought him up, and instructed him in rustic employs (*m*): hence arose the right of ward. The infant was sooner able to manage rural concerns than to bear arms, and therefore he

(*i*) *Post.* 24, (*o*); 230, (*q*). (*k*) *Post.* 2, (*k*).

(*l*) Sir *Edward Coke* says (1 *Inst.* 75, *b.*), that the lord shall have the custody of such infants during their minority, not for benefit onely, but that the lord might see that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy sciences."

(*m*) "The children [of the tenant in soccage] were educated to the labours of the plough, and if the father died, the education devolved on the next relation, on whom the inheritance could not descend; for there was no reason to cast the education of the children upon the lord, because the lord had no understanding in this sort of drudgery, but the knowledge of it chiefly lay in the family of the Socmen." *Gilb. Hist. of the Feud.* f. 49, MS.

was out of ward in the one case at fourteen, in the other at twenty-one (*l*).

Deadly feuds.

Though the greatest amity subsisted between the lord and his tenants, and though the lords themselves cordially united in a common cause, were peers, and subordinate to one head, yet they often bore the most implacable enmity to each other (*m*); and that enmity descended to their tenants (*n*). Hence was it necessary that marriages should not be contracted between the tenants of different clans without the consent of the several lords; and from this arose the incident of marriage (*o*).

Incident of marriage.

Forfeiture of the feud;

When the tenant did any act which rendered him incapable of discharging the duties of the

(*l*) See Note I. at the end of the volume.

Private wars.

(*m*) The barons claimed the right of private war, or of commencing hostilities against each other at their pleasure, and even against their king in certain cases. This usage, however, was not so prevalent in this country as in many on the Continent, yet even here it prevailed; that between the earls of Hereford and Gloucester, (in the time of Edward the First,) particularly, is frequently noticed by our historians. The truce between those nobles is curious, and is preserved by *Madox*, (*Form. Anglic* 84, No 155.) and is given also in the Appendix to *Stu. View of Soc. in Eur.* See, of the Right of private War, 1 *Rob. Cha. V. f. 1. p. 51, &c.* and note *xxi.* *De Lolme*, b. 1. c. 1. p. 12, &c. *Stuart's View*, b. 1. c. 2. f. 3. p. 38, &c.; 260, &c. 1 *Ward on the Law of Nations*, c. 12. p. 340, &c. See 4 *Bl. Comm.* 82. c. 6. *Stuart's Diff.* pt. 3. f. 3. p. 159, &c. *Butl. N. to Co. Lit.* 64. a. f. iv.

(*n*) *Post.* 143.

(*o*) *Post.* 12, (*a*).

feud,

feud, if he showed himself unworthy of its enjoyment, by deserting his lord in battle, or by the perpetration of certain crimes, it was but just that it should return to the lord from whom it was originally derived: hence came the incident of forfeiture (*p*). If, on the other hand, the lord did any thing injurious to the feudal relation, if he was guilty of injustice or oppression, he lost, in his turn, his seigniorial rights, and the tenant held immediately of the lord above (*q*). If the heirs of the tenant became extinct, there could be no one to enjoy the gift, or to return the services on which it was granted; then, too, it necessarily was resumed by the lord, and hence arose the right of escheat and reverter (*r*). of the seignior.
Right of escheat.

Again, as the whole barony was interested Aids in the fate of its lord, and, in like manner, the whole nation in that of the king; as the tenants individually were bound by gratitude to him for their gifts, and attached to him from the protection he had afforded, and the services they had been wont to pay; if the lord or the king had unfortunately fallen into the hands of the enemy, they contributed their portion to effectuate his release. In those times the feud and demesnes were inalienable: besides, the

(*p*) *Post.* 38, &c.

(*q*) *Law of Forfeiture.* 46. *Wright's Ten.* 44. *Le Grand Consumier*, c. 14. *De Feaulte. Mirroir*, c. 1. s. 3.

(*r*) *Post.* 17.

For ransom.

Knighthood.

Marriage.

lord, or king, possessed his feigniory in a political, rather than a personal capacity, and therefore it was not chargeable by the individual. Personal property was in those days very inconsiderable; and his RANSOM could only be effected by the benevolence of his faithful tenants(*s*). In after-times too, the tenants again testified their attachment and gratitude, by making the lord a present on occasion of knighting his eldest son; a circumstance attended with much splendor, and consequently with much expence. In this also they themselves were more immediately interested; the knight was the defender and servant of his country; and they contributed by their presents to support the magnificence of the scene. When his daughter also was given in marriage, they a third time evinced that attachment, by augmenting her portion by their voluntary bequests. From these grew the incidents of *aid*. In after-times too, these aids, though originally gratuities flowing solely from the munificence of the tenant, were claimed as dues, and perverted to the grossest oppressions. Other aids were often demanded, as to pay debts, reliefs, &c. &c. (*t*)

(*s*) Of ransom, see *Barrington on the ancient Statutes*, 350. 1 *Hen. VI.* 1 *Ward's Law of Nations*, c. 9. *Wright on Ten.* 112, and n. (*n*); 113, and n. (*o*); and 114, n. (*p*).

(*t*) See further, 1 *Mad. Hist. Excheq.* c. xv. p. 569, &c. *Wright*, 40, &c.; 105, &c.; 111, &c.; 125, and notes, and *Append. Stuart's View*, b. 1. c. 2. f. 5. p. 58.; b. 2. c. 1. f. 1. p. 78. 332, 333.

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A system thus founded in friendship and benevolence, in protection and gratitude, was at length to be the instrument of a tyranny the most intolerant, rapacious, and insatiable; its principle indeed was military, and inconsistent with the civilization and improvement of the people (u). As the intercourse between nations increased, as the good understanding which once only subsisted between the individuals of a clan became extended to states and countries, as the arts and civil employs became more diffused and embraced, the military spirit subsided. The knight was allowed his deputy, and at length his service was commuted for money. That military ardour and enthusiasm abated, and specie flowing on all sides into the coffers of the prince, a mercenary rabble supplanted the generous and courteous knights with their firm and their faithful tenants. A miscellaneous crowd of alien hirelings wielded the sword of power, and at length gave birth to a system the most hostile to the feelings of a brave people that ever endangered freedom, or relaxed the confidence of man in man—that of a standing

Decline of the feudal system.

Its principle was military.

Escuage.

Mercenaries.

Standing armies.

(u) *Voltaire, Spir. Nat.* vol. 2. c. 96. p. 278, 9. 8vo ed. *Dalrymple, F. P.* c. 2. f. 1. *Stuart's View*, b. 2. c. 1. f. 2. p. 88.; c. 3. f. 1. p. 110.; f. 2. p. 114. 118, &c. 3 *Enomus*, f. 69. p. 328. *Kaims's Law Tracts*, Tr. v. p. 197. *Brit. Antiq.* eff. 1. p. 12.; eff. 2. p. 26.; eff. 4. p. 156. *Essay on the Polity of Engl.* b. 1. c. 4 & 5. 1 *Rob. Scotl.* b. 1. p. 26. 1 *Charles V. passim.*

army of mercenary soldiers; an army whose interests were different from those they were supposed to defend; who were insulated in forts and barracks.

Depravity of
manners.

But this was not the only evil which attended the declension of the feudal polity. The heroic valour and magnanimity, the affection and ardour of former ages, sunk into insolence and rapacity, into venality and ingratitude; the generosity, the urbanity, the politeness of chivalry, degenerated into licentiousness and intrigue.

But there are limits even to degeneracy; there are bounds which even corruption must not pass; there is a crisis even in depravity, from whence order and salubrity are to flow. Though the entire system appear vitiated, and though dissolution itself be threatened, yet some unseen hand, which is busily though silently employed, shall still over-rule those events, and make them subservient to purposes the most benign as well as unexpected:—

“ From seeming evil still educing good,
And better thence again, and better still,
In infinite progression !”

Those principles, essential to the welfare and ends of mankind, are not to be eradicated from or extinguished in the human heart; they are implanted by Heaven as instruments of its providence, and are subservient to schemes and
systems

systems ample as the universe it has formed; they are given to propel man to an advancement in perfection and happiness, and wisely adapted to the relations in which he stands. Amid all the perturbations and convulsions he is subject to, either from exterior or internal evils, there is yet a something which shall counteract his errors, and point out the path of rectitude; which shall induce, at least posterity, to explore those paths which others have forsaken, and to adopt those measures which are congenial with the feelings of the heart. There is a kind of *vis inertia* in humanity which must restore it to its destined state; and, as man was designed and constituted for happiness and the improvement of his nature, he will one day adopt those systems and rules only which shall be evidently conducive to those ends.

Evils were permitted to be profusely scattered, but antidotes were also disseminated with as liberal an hand. Remedies grew up with the banes they were to counteract; they were discovered even in the principles of that very polity which was attacked, and found to be more strongly implanted in the human breast. The benefits which sprang from the relaxation, and even declension, of the feudal system, abundantly overbalanced the mischiefs which its corruptions had introduced. The military spirit abating, man no more considered man as an enemy, nor himself as an animal of prey. The

The principles
of polity become
enlarged.

The military
spirit subsides.

Commerce.

warrior hung up his armour, now useless, in his hall; he lived among his people, and courted their confidence and esteem; he encouraged agriculture and industry; and literature and the arts were found to be compatible with the character of the free and the great. Commerce regained its importance in the eyes of Europe, enriched nations with its blessings, and enlightened and enlarged the heart by the intercourse and reciprocal dependance it introduced. The "hum of men" was not confined to the "tower'd city," to jousts, or to tournaments, but the din of traffic resounded in our ports, and the song of peace was heard on the plain. The ocean was crowded with the vessels of trade, and the fields were profuse in their produce. The commoner by his commerce arose to importance in the state (κ). Men of all orders and ranks assimilated by degrees, and distinctions and prejudices began to be removed. The heart became expanded by intercourse and the conviction of the necessity of mutual assistance. To be enlightened, refined, and useful, appeared the province allotted to man. Each considered another as the child of a common parent with himself; of the same feelings, and subject to the same wants. Philanthropy lifted

(κ) See 1 *Robertf. Cha. V.* f. 1. p. 43, &c. *De Lolme on the Const. of Engl. passim.* *Essay on the Polity of Engl.* b. 1. c. 6, &c.

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her head, and each was to partake of her smiles. The banners under which his forefathers fought were not now to engage his inquiry. His friendship was no more to be influenced by the emblazonry of his shield, nor his affections or confidence confined within the bounds of a dukedom or manor; but the narrow conceptions of aristocratic pride, of hereditary prejudice, and of contracting and indurating bigotry, were to be dissipated by the beams of knowledge which on all sides emanated.

Positive and hasty institutions lost insensibly their power over mankind. The wants, the feelings, and the natural relations of humanity were appealed to. The laws adapted themselves by degrees to the improvements of the times. Forms of government inconsistent with those advances, relaxed, or were reprobated; and the intercourse between man and man, and between nation and nation, began to be founded upon the broad basis of universal benevolence and peace.

But as the improvements of a people are gradual, so the alterations in the laws are gradually effected. Provisions or repeals are introduced as the particular occasion demands, but the radical principles of the government remain unaltered. The feudal system, so firmly fixed in this island, has never been wholly abolished. From this system are derived our laws relative

The principles of our property-laws derived from the feudal system.

relative to property (*y*), and to it must we have recourse, in order to account for the origin and utility of many which might otherwise appear useless or unjust; and to it must we continually recur, to explain and illustrate what might otherwise seem dictated only by caprice; to trace out their principles, their spirit, their ends and effects.

By recurring to this system did our author explain what, on any other system, would have remained for ever inexplicable. He rescued many of our laws from the imputation of barbarity and arbitrary imposition; he formed an epocha in their study, by directing us where to discover their origin and principles. But he has not only benefited the student, he has reflected honour on the nation and its laws. Since his days, many have risen up in his spirit, and, animated by his example, and encouraged by his success, pursued those paths which he had so arduously and sedulously explored. To the student there cannot be presented a more ad-

(*y*) "The bulk of our common law," says *West*, "is nothing but feudal customs." *On Peers*, 3. See *Wright on Ten.* i. 135, &c. *Post.* 155. N. LXVI.

"An English lawyer, (says an elegant writer,) if he would attain the true perfection of his art, has, like the painter, his Lombard and Italian schools. Our municipal system in its progress has copied the great draughts in them both." *Enumus*, vol. i. f. 20. p. 85.

vantageous, or a more pleasing fund of information, than their labours have produced. This Introduction, therefore, shall be concluded with acknowledging the obligations which the writer of it owes to their works, and by referring more particularly to those of their productions which merit so peculiarly the attention of him who would wish to be acquainted with the rationale of our law (z).

(z) *Stuart's View of Society in Europe*, and his *Historical Dissertation on the Antiquity of the English Constitution*. *Sullivan's Lectures on the Laws of England*. *Kaims's Historical Law-Tracts*, and *Essays on British Antiquities*. *Dalrymple's Essay towards an History of Feudal Property*. *Dr. Squire's Historical Essay on the Anglo-Saxon Government*. *Millar's Historical View of English Government*. *Wright's Introduction to the Law of Tenures*. *Blackstone's Commentaries*, vol. 2. *Mr. Butler's Note to Co. Lit.* 64, (a). *Montesquieu's Spirit of Laws*. *York's Considerations on the Law of Forfeiture for High Treason*. *Robertson's Charles the Fifth*, vol. 1. *Lord Lyttelton's Hist. Hen. II.* vol. 3.



THE
O R I G I N
OF
C O M M O N L A W
T E N U R E S.

Of FEUDS (a).

A FEUD is a right that a vassal has in some lands, or some immoveable (b) thing of his lord's, to take the profits (c), paying the feudal duties. Spelm. Rem.
fo. 2.

The feudal property was very unsettled in ancient times (d). The lords succeeded by

(a) [See Note II.]

(b) [In after-times feuds were permitted of incorporeal things. See *Sulliv. Lect. vii.* p. 74. *Stuart's View*, b. 1. c. 2. f. 3. p. 43, 4. *Butler*, n. to *Co. Litt.* 64. a. f. ii. 1 *Rob. Cha. V.* f. 1. N. (H), p. 264. 2 *Roll. Abr. Ten.* (D) & (E), 500, and *Post.* 332. N. CLXXVI.]

(c) [See N. III.]

(d) *Antiquissimo tempore sic erat in dominorum potestate connexum, ut quando vellent, possent auferre rem in feudum a se datum.* Feud. lib. 1. tit. 1. [See *Wright's Ten.* 14. n. (c). *Gilb. MS. Hist. of the Feud.*]

election

election or strong hand ; the tenants temporary, or at the will of their lords.

(*e*) When the barbarous nations had invaded the *Roman* empire the vassal's estate became certain for life (*f*), then to all his descendants. Opposite to feudal property is *allodium* (*g*), which seems to be the old patrimonial property revived by the christian clergy among the barbarous nations (*b*). This obtained among our *Saxons* (*i*), and gave birth to gavelkind (*k*).

Ld. Raym.
1024. 1292.

Salk. 243.

(*l*) Feuds are hereditary, or for life. In hereditary feuds the word *heirs* is required to distinguish it from the original feud that was for

(*e*) *Deinde statutum est ut usque ad vitam fidelis producere-
tur.* Feud. lib. 1. tit. 1. ; [and see *Wright's Ten.* 14. n. (*e*).]

(*f*) [See N. IV.] (*g*) [See N. V.]

(*b*) *Somner's* treatise of gavelkind, p. 8, 9. 115: 172.
[and see *Wright's Ten.* 206. n. (*q*) & (*s*).]

(*i*) [See N. VI.] (*k*) [See N. VII.]

(*l*) There are several divisions of feuds, viz.

Feudum nobile & ignobile. Crag. de jure feud. 56. Zafius
in usus feud. fo. 5.

Feudum ligium & non ligium. Seld. tit. of honour, 38. 39.

Francum & non francum. Crag. de jure feud. p. 79.

Reale & personale, vel perpetuum & temporale. Zafius in
usus feud. fo. 5.

Ecclesiasticum & seculare. Zafius, fo. 6.

Antiquum seu paternum & novum. Feud. lib. 3. tit. 50.

Dividuum & individuum. Crag. de jure feud. p. 58.

Masculinum & fæmineum. Zafius in usus feud. fo. 120.
[See further of the division of feuds, *Wright's Ten.* 22,
&c. and notes. *Sulliv. Lect.* vii.]

life

OF FEUDS.

3

life only (*m*). In hereditary feuds the descent is to be considered, where the usage of other nations is to be compared with the feudal.

The notion of regular property begun among the *Jews* and *Egyptians*. The *Jews* were taught from heaven, and the *Egyptians* by the inundations of *Nile*, to settle in regular neighbourhood; and from the *Egyptians* the notions of property came to the *Greeks* and *Romans*.

Among the *Jews*, *Egyptians*, *Greeks*, and *Romans*, the father was the head of the family, and had the inheritance and the power of life and death over his children (save that by the *Jewish* law it is tempered); for the father might not kill his son but in the presence of the public magistrate. Deut. xxi. 18.

Among the *Jews* (*n*) and *Egyptians*, inheritance descended by settled rules in their tribes and families; and the will could only be made of acquisitions. Then they could not so make a will as to disinherit the eldest son of his right of primogeniture, which was that of a double portion. Deut. xxi. 15, 16, 17.

If a man died, the inheritance and acquisitions undivided descended to his sons equally; only the eldest had a double portion. This law

(*m*) [See N. VIII.]

(*n*) [See further of these successions, *Hale's Comm. Law*, 242. c. 11. *Robins. Gavellk.* b. 1. c. 2. 2 *Bl. Comm.* c. 14.]

arose

The eldest son was to be sacrificed, and so was to be redeemed from the priest.

arose because they apprehended such son the beginning of the father's strength; therefore he was to be thought sacred, and to be redeemed from the priest, and to bear the honourable charges and offices of the state: but because the words of the law give the reason, that the son was the beginning of the father's strength; therefore the privilege was personal, and went only to the eldest. So if a man had issue *A.* and *B.*, *A.* had issue *C.* and *D.*, and *A.* had died, *C.* and *D.* should have the double portion of their father, but *C.* had no greater share of it than *D.* nor did the double portion ever prevail, where the descent was to brothers and other collaterals.

Selden de succession. apud Hebræos, c. 23.

(o) If a man had no sons, his daughters inherited, but without double portion to the eldest; but they

(o) This right of representation is not peculiar to the law of *England*, but is observed by the laws of most countries; and we read in *Numbers*, ch. xxvi. ver. 33. and ch. xxxvi. that when *Zelophebad* the son of *Hepher* died, leaving no sons, but daughters, they came unto *Moses*, and claimed the possession of their father. This being a new case, *Moses*, it is said, brought that case before the Lord, who commanded him to give unto them the possession of their father. So that it was here determined that they should take the double portion belonging to their father, as the eldest son, by right of representation. And this right of representation was practised among the *Romans*, and was the law of the twelve tables. *Selden de success. apud Hebræos*, c. 23. And this right of representation holds in inheritances descendible by

they were obliged to marry among the families of the tribes, that the inheritance might keep among the same families.

If a man had no descendants, it went to the *agnati* or kindred of the father's side; and it never went to the *cognati* or kindred of the mother's side, because the father gave the denomination to the families.

If a man died intestate, his acquisitions went first to descendants, then to his father, as nearest relation; then to brothers as representatives to his father; only they had a law, that if a brother married the deceased's wife, and had issue, such issue bare the name of the deceased, and had the inheritance, exclusive of all others.

If the deceased had neither father nor mother, it went to the grandfather, and to the uncles and nephews, as his representatives, and for failure there, to the great grandfather and his representatives *in infinitum* in the same order.

As to inheritance, that went to descendants, and then to collaterals; for that must have passed the ascending line before it could have settled in the descendants; so that *Moses*, when

[6]

Numb. xxvii.
from 1 to 11.

Lev. xxv.
ver. 8 to 14.
The Agrarian
law among the

by custom, as well as by common law, as in the case of gavelkind lands, borough *English*, &c. and there is a remarkable case adjudged in the *C. B.* in my Lord *Bridgman's* time, *anno* 1660, 1661. and entered *Hil.* 1655. *rot.* 779. between *Hale* and ———; but it was never printed until my Lord *Raymond's* time. See Lord *Raymond's Rep.* 1025, 1026, &c.

D

he

Romans was, to divide the lands got by conquest among the soldiers equally, &c.

he speaks of the laws of inheritance, doth not mention the father, because he must have had it before it could come to the son.

As a man could not devise the inheritance, so he could not sell, but from the time of sale to the general jubilee, which was once in fifty years; then there was a rotation of all possession, and every man was instated in his own, which was the *Jewish Agrarian* law. See *Hale's Success.* 5 to 11.

[7] The *Roman* law differed from the *Jewish* in that the father had the power of life and death over his children without the magistrate, so that he might destroy his sons, which was frequent in the ancient *Roman* times; for they used to expose their issue, if they had more than they could keep. From hence began the right of adoption: for to preserve children from death, they were adopted into other families, and became children of that family to whom adopted. And as a *Roman* had power to destroy his children, so he might disinherit them by his will in express words. But if he only pretermitted them, and gave them nothing, then the pretor introduced them to an equal portion with the rest. So that a *Roman* had an entire power over his children while he lived, and whatever they got was their father's, and at his death, he might dispose of it as he pleased among his other children. If he died without such disposition, it first went among those of his own family,

family, whether male or female, by him begotten or adopted. If any of his sons died, the grandchildren succeeded into his portion *in stirpes*; but the pretor brought in children emancipated equal with the rest; for though such were out of their father's family, yet the natural relation continued; but if an adopted son was emancipated, he took nothing. The children of daughters did not inherit [to] the father, because they were out of his family.

If a man had no *sui hæredes*, by the old Roman law it went to the *agnati*, as first to brothers as representatives of their fathers; to uncles *ex representatione* of their grandfathers, *in capita in infinitum*, after the Jewish model; but the pretor brought in the *cognati* in equal degrees *in capita in infinitum*, to inherit with the *agnati*. Because, by the indefinite liberty of devising, they could not keep estates in their tribes; therefore the *cognati* entered in according to their natural relation.

[8]

A son emancipated, or a son that had acquired a *peculium*, after they had allowed that privilege to sons in the life of their fathers, on failure of issue was inherited first by the ascending line, and that failing, by the collateral, only brothers of the whole blood were called in *in capita* equal with parents and their children *in stirpes*; for such brothers being of both bloods, they were held equally dear as either parent. On failure of the ascending line, and brothers

OF FEUDS.

and sisters of the whole blood, it went to brothers and sisters of the half blood, and their children *in stirpes*, by the *Justinian* constitution. On failure of them it went to those persons that were next in degree *in capita*; and those that were equally in degree inherited equally, as uncles on the father's and mother's side. And the next in degree excluded the more remote, as an uncle living excluded the son of an uncle deceased; and the degrees were computed up to the common ancestor, and then down to the person to whom the relation was made: therefore uncles are of the third degree, uncles sons in the fourth degree. But things descended from the father descend to the degrees on the father's side, according to those rules, that things descended from the mother descended to the degrees of the mother's side, according to the same rules.

[9]

The 22 & 23 *Car. 2. c. 10.* has introduced this law into *England*, in relation to intestates estates. Only one third is to the wife, two thirds to the children, the heir at law taking equal with the rest: and the portion of a child preferred to come in average with the rest. For want of children the wife is to have one moiety, and the next of kin the other. If no wife, the father is to have the whole, as next of kin. But by the stat. 1 *Jac. 2. c. 17.* the mother is to inherit equally with brothers and sisters, and their representatives, according to the
Justinian

Justinian law: and by the stat. of *Car. 2.* the succession is carried to brothers and sisters children *in stirpes* (*p*), according to the civil law, save only that no distinction is made between brothers and sisters of the whole and half blood (*q*); because the law speaks of brothers and sisters children indefinitely, without distinction of bloods; and the spiritual courts had never distinguished the bloods, because the canon law, where the degrees of proximity were settled in relation to marriages, had made no such distinction. For want of brothers and sisters, and their children, next of kin succeed *in capita*, according to the afore-mentioned rules of civil law, where the next in degree succeed both on father's and mother's side, and excluded the more remote. But in our law the intestate is considered as the original proprietor in whom the estate is vested. So no distinction is taken between things coming from the father's or mother's side (*r*).

[10]

(*p*) [See the case of *Stanley v. Stanley* in 1 *Atk.* 457.]

(*q*) [See *Cartb.* 51. *Brown v. Farndell. Show. P. C.* 108. 110. *Watts v. Crooke. Bunbury*, 158. *Janfon v. Bury*, and *Wall v. Theedham* (there cited).]

(*r*) [If there are relations both on the father and mother's side in equal degree, they shall take together. See 1 *P. Wms.* 53. *Moore v. Barkham*, (cited). *Sir Tho. Raym.* 500.]

The feudal succession came in in this manner (s): the lords gave lands to such persons as behaved themselves well in the war, for their lives only (t): sometimes they also married their daughters to them. Then by their feudal donations, they limited the lands to go not only to the feudary himself, but also to the issue of that marriage (u); and this brought in the notion of succession among the northern nations that invaded the *Roman* empire. The lands therefore in the elder times went to the immediate descendants of such marriage, and originally to none else: and first they went to males, as the most worthy of blood, and most capable of doing the services annexed to such donations; for want of males it went to females (w), as descendants of the same marriage.

[11]

Lud. 114, 115,
116, 117.

(x) The feud was united in the eldest male,

(s) *Deinde statutum est ut usque ad vitam fidelis produceretur.* Feud. lib. 1. tit. 1.

Postea vero eo ventum est, ut ad recipientis vitam perduraret. Hanne-ton de jure feud. 139. [See *Wright's Ten.* 14. n. (s).]

(t) [See ante. N. VI. & VIII.] (u) [See N. IX.]

(w) [See N. X.]

(x) *Ordain fuit que fee de chevaler deviendroit al eigne fils per succession de heritage, & que socage fee fuit partable perenter les males infants.* Horn's Mirror des jus. lib. 1. c. 1. f. 3.

Præ-

male (y), because he was obliged to do the duty in the wars; and for every knight's fee, was to go out forty days with his lord (x); so that the feud did not divide among the males, because the duty could not be divided commodiously. Because, secondly, the males were to keep up the grandeur of the family, therefore the inheritance was not shared nor broken. Hence it came to pass, that among the males the eldest was preferred as the most worthy, since he was soonest able to go to the wars, and do the duties of the tenure. [12]

The eldest son was anciently married with the consent and approbation of the lord; for the lord always approved the first marriage of his feudary and of his heir apparent (a); and if

Proles feminei sexus, vel ex femineo sexu descendens, ad successionem aspirare non potest, nisi ejus conditionis sit feudum, vel ex pacto acquisitum. Feud. lib. 2. tit. 2. §. 2. tit. 11, 30, 50, 104. [See *Wright's Ten.* 176. n. (u); 178. n. (d).]

(y) [See N. XI.]

(x) [See 2 *Bl. Comm.* c. 4. p. 55. c. 5. p. 62. *Wright's Ten.* 123, 4. and notes, 139—40. *Sulliv. Lect.* xxxi. p. 289. *Stuart's View*, b. 2. c. 3. §. 1. p. 109. 112. 367. n. (5). *Gilb. MS. Hist. Feud.*

By the laws of *Hoel Dda*, the king of Wales is stated to have had the prerogative of leading his army out of his kingdom once a year, and that for *six weeks* only. Within his territories, it seems, he might have conducted his forces to battle as often as he deemed it requisite. And see 1 *Warr. Wales*, 243. 1 *Whit. Manch.* c. 8. §. 3.]

(a) [See N. XII.]

the feudary died, the heir within age, the lord
Spelm. Rem. 29. had the total marriage of him; and if he was
of full age, the lord gave licence to such marriage.
Hence the descent always settled in the
eldest line, and the daughter of the eldest son
was preferred before the second or third brothers
(*b*), and their male descendants, in order
to encourage the best marriages with such eldest
son; and this was the settled course of the (*c*)
feudum nobile. Whence our law took the pattern
for their military tenures, and the socage
tenures, divided in *Saxon* times as (*d*) *feudum*
ignobile, but afterwards came to imitate the military
feud, in order to support their families (*e*).

The feudum
ignobile was
dividable
among the sons.

[13]

If there were no sons the feud came to the
daughters, who divided it (*f*), because by the
donation it was to go to all the descendants;
therefore the female descendants could not be
excluded, and one of the daughters could not
be preferred before the other, because none
could do the service of the feud in their own
persons, nor did any of them bear the name
and dignity of the family. Therefore these
were married by the lords among their tenants;

(*b*) [See N. XIII.]

(*c*) *Zafius in usus feud. fo. 5.* [See *Wright's Ten. 24. n. (d).*]

(*d*) *Stry. exam. jur. feud. cap. 3. q. 36, 37.* [See *Wright's Ten. 24. n. (e).*]

(*e*) [See *ante*, p. 2. N. IV.]

(*f*) [See *ante*, p. 11. N. X. & XI.]

so they kept the feuds in their several manors from being broken and divided; as if two daughters divided a knight's fee, the lords, by the marriage of such a daughter with one that had half a knight's fee, re-established the feuds of their tenants.

If in such feudal donations, the elder line had failed, it went back to the issue of the second son of the same stock, to whom the first donation was made, and to his descendants, because by the feudal donation it went to all the descendants of such marriage, and so the succession was established to the descendants of the same stock *in infinitum*, but could not go to any other relations but to such as were descendants of the stock to whom the donation was made (g).

In a long course of years these feudal donations were worn out, when it became impossible (b) to compute up to the first feudal marriage when such donations were originally [14] settled; and then they inverted the computation, and computed from the last possessor, provided the heir that claimed, was of the blood of the first purchaser; and then the rule was taken *quod seixina facit stirpem*; for since the feudal donation was lost, they could not regularly

(g) [See N. XIV.]

(b) [See *Wright's Ten.* 183, &c. *Dalrymple, F. P.* 2. 5. f. 3. p. 218. 2 *Bl. Comm.* c. 14. p. 228. *Butl. n. to Co. Litt.* 64. a. f. v. (4). *Law of Forfeiture*, 28, &c.]
compute

compute the descendants from the first feudal marriage; therefore they computed from the last feudary; and since both bloods of the first marriage were necessary to any person that would claim under the first donation, they required that a man should be of the whole blood of the last feudary that would claim as heir to him; for then of necessity he must be of both bloods of that remote feudal marriage, where the feud was originally placed. Thus half blood came to be excluded (*i*); because if it were admitted where the feudal donation was lost, it might have carried it out of the line, where such donations were once settled; so that in such case they put the person, claiming as heir, to shew that it was an ancient feud, and that the party claiming was of the whole blood of the last possessor, which formed the utmost presumption of the right of succession, where the feudal donation was lost; which half blood did not do; because it was originally settled in both

[15] the bloods of the first purchasers. Besides, lords had the marriage of the feudary; therefore all the issue of the second marriage were excluded from the immediate inheritance of the

(*i*) [Of the exclusion of the half-blood, and the reasons for it, see 2 *Bl. Comm.* c. 14. p. 224. *Dalrymple, F. P.* c. 5. s. 3. p. 217. *Hale's Com. Law*, c. 11. *Kaims's Brit. Antiq.* ess. iv. *Wright*, 182. *Co. Litt.* 14. a. n. (3), and 64. a. n. (1). s. v. (4).]

children of the first marriage, since the lord had not the marriage of the feudary more than once; and therefore they could not come in as issue of a second match; but all that claim the inheritance must make themselves heirs under the same feudal marriage from whence the last feudary descended, which half blood could not do. But where they can come in under any marriage presumed to be made by the feudal lord, they were admitted. Therefore a brother of the half blood was not heir to the brother, but might be heir to the uncle. Hence they formed the rule, *possessio fratris de feodo simplici facit sororem esse hæredem*. For when the old feudal donations came to be lost, the possession was the only *indiciu*m of who was feudary; therefore any person that claimed as his representative, must shew a descent from the same stock, and therefore the rule was taken as to lands in fee-simple, and not as to lands in tail (*k*). For there a man must claim as heir *per formam doni*, as they did in the old feudal donations *de feudis novis*; so of a remainder after an estate for life, that never fell in possession, a man must claim, by virtue of the contract, as heir to him to whom the remainder was limited; for no man in such case can make himself heir

[16]

(*k*) [There can be no *possessio fratris* of an estate-tail. See Fitzb. Abr. t. Discent. pl. 8. Plowd. 57. 3 Co. 42. a. Watk. on Desc. c. 1. s. 4. p. 86.]

to the last feudary, since the feudal possession was in tenant for life (l). So of a reversion on an estate for life, upon which no rent was reserved; for a man must make himself heir to the last feudary before the estate for life was created; but if a rent had been reserved, it had been doubted whether he must make himself heir to the last possessor of the estate, or to him that last received the rent; and whether the receipt of rent make such a feudal possession as may be laid as esplees in a writ of right (m). Certain it is, that if a reversion be depending on an estate for years, the possession of the rent is a possession of the land itself; and the sister of the whole blood will be heir to the brother; and the brother of the half blood, that is heir to the father that made the lease, will have no title (n). There is *possessio fratris* (o) of an advowson or rent, after actual receipt of rent or presentation of the clerk. So of an use, because equity followed the rule of the common law. So of a copyhold, where the eldest son

Co. Litt. 14, 15.
4 Rep. 21.

(l) [See *Watk. on Desc.* c. 1. f. 1. p. 41. f. 4. p. 85. c. 3. f. 1. p. 108, &c.]

(m) [It is now apparently settled, that the receipt of rent in these cases will *not* make a *possessio fratris*. *Co. Litt.* 15. a. n. (5), and *vide Post.* 18.]

(n) [See *Watk. on Desc.* c. 1. f. 2. p. 48.]

(o) [Of what hereditaments a *possessio fratris* may be, see *Watk. on Desc.* c. 1. f. 2, and 4.]

receives

receives the profits, and dies, though before admittance.

(p) Afterwards where the feud escheated (q) [17] to the lords for felony or want of heirs, the lords were wont to restore the feud to the old family, or grant it out again to another family *ut feudum antiquum* (r), and then the descents were formed in such new feud, as if it had been *feudum antiquum*. Hence the lineal succession, or succession of the father (s) was totally excluded, because no case could happen where the ascending line could be admitted *in feudis antiquis*; for the father took before the son, under the first feudary in every ancient feudal donation; and all above such donation were excluded, so that in no such donations could any father claim as heir to the son.

And this order of descent, that excluded the father (t), was the rather continued, because the father was guardian to the son; and in those

(p) *Revertitur terra ad dominum capitalem, vel ad rectum dominum, scil' ad ipsum de cujus feodo est.* Braët. lib. 3. fo. 130. lib. 4. fo. 160. b. [See *Wright's Ten.* 115. n. (q).]

(q) [See the *Introd.* p. xix.] (r) [See N. XV.]

(s) *Successionis feudi talis est natura, quod ascendentes non succedunt, verbi gratia, pater filio.* Feud. lib. 2. tit. 50, 84. Lit. fec. 3. [See *Wright's Ten.* 179. n. (g).]

(t) [Of the exclusion of the ascending line, see *Dalrymple*, F. P. c. 5. § 3. 2 *Bl. Comm.* c. 4. p. 208. *Hale's Com. Law*, c. 11. p. 262, and *Runnington's* n. (D). *Wright's Ten.* 179. Co. Litt. 11. a. n. (1).]

barbarous

[18]

barbarous times they would not trust the father with any profit from the death of his own issue, so that the father was totally excluded (u). *De feudis*, 153 to 261. But a feud purchased by the son shall descend to the uncle, to whom the father may be heir (w), if the uncle be in actual possession of such feud (x); because he claims it then as heir to the last feudary, according to the rule before established, since the first donation is not to be considered, but the last possessor. But if the uncle was not in actual possession, as in case of a reversion upon a lease for life made of the lands by the son, the father cannot be heir, because the son was last actually seised. Otherwise of a reversion upon a lease for years, for the possession of the tenant is the possession of the uncle (*ut ante*) (y).

Ld. Raym. 35.

If a son be infeoffed with warranty, and the uncle enters into the land after the death of the son, and dies, it is doubted whether the father shall take the benefit of such warranty, where the uncle hath not, as it were, actually possessed it by voucher or *warrantia chartæ*. *Coke* excludes the father, as not representing the son,

Co. Litt. and
Hale upon it,
fo. 24, 22.

(u) [See N. XVI.]

(w) [Litt. f. 3 & 8. and Ch. on those sections. *Wright*, 182, 3. *Dalrymple*, F. P. c. 5. f. 3. p. 216.]

(x) [See the books referred to in the last note, and *Watk. on Desc.* c. 1. f. 1. c. 3. f. 2.]

(y) [See *ante*, 16, and n. (u).]

with

with whom the contract was made. *Hale* admits him (x); for since the uncle was possessed of the land, he was in actual possession of all its appendices (a).

(b) If a man purchased the *feudum novum ut feudum antiquum* (c), and died without issue, it went first to the father's side, because the lords in such feudal donations were presumed to respect the father's side, who had been the ancient tenant of the manor. For when it was given *ut feudum antiquum*, it must be presumed to be meant as if it had been an ancient feud of that manor; therefore it went to the father's side *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were presumed rather to respect the female blood of their former tenants in (d) the blood of the mother, who was newly introduced into the family of such their feudary, because the feud was given as an ancient one, and by consequence the blood of the precedent tenant was preferred to any other; but the

[19]

(x) [See n. (1) to *Co. Litt.* 12. a.]

(a) [See *Watk. on Desc.* c. 1. s. 2. p. 60, 1.]

(b) *Hanneton de jure feud.* 30. [See *Wright's Ten.* 25. n. (m) and (n).]

(c) [See *ante*, p. 17. N. XV. and *Watk. on Desc.* c. 5. p. 147.]

(d) ["In the blood of the mother." It should run—"than the blood of the mother." *Gilb. MS. Hist. Feud.*] blood

[18]

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Hale upon it,
2s. 21, 22.

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(*w*) [*Litt.* f. 3 & 8. and *Co.* on those sections. *Wright*, 182, 3. *Dalrymple*, F. P. c. 5. f. 3. p. 216.]

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[19]

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(c) [See *ante*, p. 17. N. XV. and *Watk. on Desc.* c. 5. p. 147.]

(d) ["In the blood of the mother." It should run—"then the blood of the mother." *Gilb. MS. Hist. Feud.*] blood

blood of the father's mother was preferred to the blood of his grandmother, being both female bloods, and both coming under the consideration of ancient tenants, the nearer tenant's blood was preferred to the more remote (e). But if the father's side wholly failed, who were presumed to be the ancient tenants of the manor, then the blood of the mother was admitted, since the lord must be presumed to introduce the blood of the mother, when he had given [20] an indefinite right of representation to his feudary, and there was none of the ancient kindred on the father's side remaining; for then it must be supposed his intention, that it should descend as if it had been a maternal feud; for otherwise he would have limited it to the feudary for his life, or to the feudary and his issue, after the manner that was used in the limitation of new feuds.

Greg. lib. 4.
sect. 6.
2 Inst. 97.

Bastards (f), or children born out of wedlock, were totally excluded from all feudal succession, though their parents had afterwards intermarried, because the lords would not be served by any persons that had that stain on their legitimization, nor suffer such immoralities in their several clans; though the civil law admitted them as adopted by the subsequent marriage, and so the canon law, because the matrimony wiped off the precedent guilt (g).

(e) [See N. XVII.]

(f) [See N. XVIII.]

(g) [See N. XIX.]

Of DESCENTS which take away ENTRIES.

WHEN any man is disseised (*b*), the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have the right of possession; for in respect to the disseisee he has no right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir (*i*).

The notions of the law do make this title to him (*k*), that there may be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it is the law that gives him this right, and obliges him to these duties, antecedent to any act of his own, it must defend such pos-

(*b*) [Disseisin is the wrongful amotion or ouster of a person who was in possession of the freehold in deed. Of which see *Co. Litt.* 153. *a.* 181. *a.* 277. *a.* 1 *Burr.* 60. *Taylor d. Atkins v. Horde & al.* *Cowp.* 701. *S. C.* 3 *Bl. Comm.* c. 10. p. 169. 2 *Ibid.* c. 13. p. 195.]

(*i*) [See N. XX.]

(*k*) ["to him," *i. e.* the heir of the disseisor.]

session from the act of any other person whatever, till such possession be evicted by judgment, which being also the act of law, may destroy the heir's title.

[22]
 Litt. sect. 386,
 387, 8, 9.

In the case of fee-tail (*l*), the possession is thrown upon the heir in tail, therefore the law constitutes the *jus possessionis* to be in him.

If a disseisor, at the time of his death, has not the freehold in him, it cannot be cast upon his heir; for then there is no danger that the freehold should want a possessor; therefore the law creates no title to such possession in the heir at law; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor. The law will not afterwards create him a new title, in prejudice of the person that has the right of propriety.

If the disseisor therefore makes a lease for life, he parts with the possession; and cannot transmit it to the heir, since he had parted with it at the time of his death, and the descent of a reversion will not make a right of possession (*m*); for nothing descends to the heir in reversion but the right of the reversion, and that is a right against all other persons but the disseisee. For since only the right descends, the heir can be in no better case than the disseisor was at the

(*l*) [See N. XXI.]

(*m*) [*Watk. on Desc.* c. 3. s. 1. p. 110. n. (*r*).]

time of his death ; and therefore when tenant for life dies, he has only the naked possession, as the disseisor had it. But if the disseisor had died in possession, the law, for the reason aforesaid, casting the possession on the heir, makes it a right ; for that is properly a right which a man comes to by the act of the law ; and since the heir in such case would come to the possession by the act of the law, it must be called a right of possession ; and it could not be a right of possession, if he could not defend it against all aggressors ; therefore in such case the right of entry is taken away from all others ; and hence the distinction came to be made between *jus possessionis* and *jus proprietatis*. [23]

A second reason why the descent creates a right of possession is, because the disseisee has not claimed during the life of the disseisor, and the right of *possession* is presumed to be derelict, if the party ceases to claim it, till the law for the necessary causes before-mentioned is obliged to cast it upon another ; but the right of property is not presumed to be derelict, till the time allowed for the limitation of those actions be expired. So that *Coke* says, Anciently a feoffee that came in by title, though by his own act, after a year and a day, had a right of possession (n).

A third

(n) [*Co. on Litt.* 237. b. The statute 32 Hen. 8. c. 33. does not extend to a feoffee of the disseisor ; and therefore the

Spcim. Feud. 31.

A third reason why descent gives a right of possession is, because originally the relief was in nature of a new purchase upon every descent; for then it did again fall into the lord's hands, till it was relieved out of his hands by such payment (o).

Now for such payment they immediately dis-trained upon the possession as soon as ever the descent was cast (p); so that the heir was forced upon such payment, in preservation of his stock left on the ground by his ancestor; and being forced upon this purchase, it is fit he should enjoy the right of possession. But where a disseisor makes a lease for life, and dies, and the reversion descends on the son, if he enters after the death of tenant for life, he shall pay a relief; and yet such a descent shall not take away an entry, because it was his own fault that he entered and stocked the land himself, and made himself subject to the relief; for then the buyer must beware, and take the title in the condition it was in at the death of the ancestor.

Fourthly, The right of possession is gotten by the descent, that it may be an encouragement to the tenant to be bold in war; for that none can enter and dispossess his children of the estate

the descent from such feoffee will toll an entry though he had not been in continual possession for five years before.
Co. Litt 238. a. 256. a. 1 *Burr.* 108.]

(o) [See N. XXII.]

(p) [See N. XXIII.]

whereof

whereof he dies possessed; but if another doth the duties of the feud at his death, then it is not reason that such a descent should give a right of possession to his heir.

The escheat doth not take away the entry, Litt. 102. 390. because, though in respect of a stranger's *præcipe*, the law doth cast the freehold upon the lord, antecedent to his own act; yet the lord need not enter to take the profits and to do the duties, as the heir is obliged to do, but the lord may take the disseisee as his lawful tenant (*q*). And it is plain that the law doth not cast the freehold upon the lord in the same manner as it doth upon the heir, because the lord is obliged to answer the feudal duties to the lord paramount, in respect of his feigniory, whether this possession was cast on him or not; so that in this case there could be no failure of duty, though the lord doth not enter.

In the case of a feoffment upon condition, 2 Inst. 286. Litt. 102. 391. there is no distinction between the right of possession and the right of propriety, but both rights are in the feoffee till the condition broken, and entry for such breach; and afterwards both rights are in the feoffor; therefore the descent doth not take away the entry, since the possession and the propriety descends in the same manner, *viz.* under the condition that it was at first granted; and the possession is not

[26]

(*q*) [See N. XXIV.]

cast upon the heir while the propriety is in some body else, as in the former cases; and it is the descent of a naked possession to an heir at law, that forms a *jus possessionis*, distinct and abstracted from the *jus proprietatis*. But here both rights are united at the time of the descent; and if the feoffor in this case could not assert his claim by an entry, he could have no remedy, either for his *jus possessionis* or *jus proprietatis*, which are not here separate or distinct; for till he enters to take advantage of the breach of the condition, both rights are in the feoffee, because the solemnity of the feoffment cannot be determined but by an act of equal notoriety; and because the possession and right are not here separate or distinct, it is called by a different name, viz. not a right, but a title of entry.

Litt. sect. 393,
4

(r) The law doth not cast dower upon the wife,

(r) We find no footsteps of dower in lands, until the time of the Normans. *Bacon's History of the Eng. Gov.* 104, 146.

But amongst the laws of the Saxon King *Edmund*, cap. 51. we find a provision made for the support of the wife that survives her husband out of his goods only.

Nor was there any dower in *Wales*, until it was annexed to the crown of *England*, as appears by *Stat. Walliæ*, viz. *Quia mulieres hæcenus non extiterant dotatae in Wallia, rex concedit quod dotentur.*

[See *Wright's Ten.* 192, and n. (t), (u), (x).

Of the introduction of dower into *England*, &c. see 2 *Bl. Comm.* c. 8. p. 129. *Wright*, 191. See also *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 2. and notes (4), &c.

There

[27]

wife (*s*), but she takes it by her own act; but when she is endowed, she is in from the death of her husband (*t*); therefore she has only the naked possession her husband had, not any *jus possessionis* at all; since it was not of absolute necessity she should claim her dower; but it is of absolute necessity that the law doth cast the freehold upon the heir. Now by the endowment the possession is avoided that the law cast upon the heir (*u*), because she, as is said, is in from the death of her husband, and by consequence there is no right of possession, as to this third part, acquired to the heir at law; since the law doth not place him in such third, after the death of the father; and though the reversion belongs to him after the death of the mother, yet that is only the reversion of that which the mother possessed, which was a naked possession; and so he has herein no right of possession at all.

Where the disseisor infeoffs the father (*w*), it is presumed to be done in order afterwards to

Litt. 62. 395;

There was no dower originally in Wales, *vide Wright ubi sup.* nor in Ireland. See *Davy's Rep.* 49. b. 50. a & b.]

(*s*) [See N. XXV.]

(*t*) [*M.* 24 *Ed.* 3. *pl.* 18. *f.* 32. *b.* 33. *a.* 70. *b.* 71. *a.*; and see *Watk. on Desc.* c. 1. f. 3.]

(*u*) [See *M.* 24 *Ed.* 3. and *Watk. on Desc.* as before, and *Co. Litt.* 241. a. n. (1).]

(*w*) ["the father," *i. e.* his own father. See *Litt.* f. 395.]

[28] come in by descent, and the act of law shall not give sanction to the wrong of the party ; nor shall any man by his own wrong, however cunningly contrived, give to himself a right ; for when the heir by the descent gains a *jus possessionis*, he is supposed innocent of the wrong of his ancestor ; but here he is partner of the guilt.

Litt. sect. 396,
7.

When a younger brother enters in this (x) case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possessions of the father in the family, that no body else abates. For since this is the most charitable interpretation that can be made of this action, and by such a construction it is just and rightful, the law shall not intend it to be a wrongful act or disseisin, and by consequence the possession of the younger brother becomes that of the elder brother (y) : and then if there be not a possession distinct and separated from the right, the descent cannot make a right of possession distinct from the right of propriety ; for it were incongruous that the ancestor

(x) [That is, where a person dies seized in fee, leaving two sons, though the eldest be heir, yet, if the younger enter, he shall be considered as holding the possession for his elder brother. See *Litt. s. 396, 397.*]

(y) [And it will so fix the possession in the eldest brother as to cause a *possessio fratris* in him, even to the exclusion of the younger who enters, if he be of the half-blood. See *Co. Litt. 242, Bull. N. P. 102. Watk. on Desc. c. 1. s. 2. p. 55, 56.*]

should

should be construed to possess in another's right, in order to do no injury, and the heir should be construed to possess in his own right, in order to do injustice to the elder brother. Besides, no laches can be imputed to the elder brother, since the younger entered and possessed for him. But if the younger brother in this case had made a feoffment in fee, and the feoffee had died seised, this descent had taken away the entry, because then the younger brother could not be interpreted to enter to preserve the estate of the elder, but in order to make the advantage of it for himself. So in the case *Litt. puts*, If the elder brother had entered, then if the younger had entered upon him, this had been in destruction of the elder brother's possession, and therefore the younger gets a possession distinct from that of the elder brother, and his heir a distinct right of possession, and it is the laches of the elder brother, that he did not enter to restore his possession.

[29]

Co. Litt. fe.
242.

If one coparcener enters into the whole, it is only in preservation of the estate of the other; but if she disseiseth the other after her entry, there she gets a possession distinct from that of her sister, and the descent will take away the entry, *causa qua supra* (x).

Litt. fe. 395.

The issue of the bastard eigne not only gains a right of possession, but a right of propriety

Litt. fe. 399.
400, 1.

(x) [See *Watk. on Desc.* c. 1. s. 2. p. 52.]

[30]

by the enjoyment of his ancestor. Such issue are held legitimated (*a*) by the civil law, because they are adopted by the marriage of the mother. So by the canon law, because the *matrimonium subsequens tollit reatum precedens*; but by the feudal law they were excluded, because such a stain was thought to continue from the crime of the parents, that they could not do the feudal service with honour to the feudal lords; therefore they were anciently excluded *nisi nominatim ad feuda legitimantur*. But by our law, if they had an uninterrupted enjoyment during life, the issue for ever inherited; for since there was no objection to their legitimation during their lives, the personal defect must die with their person, in as much as it were inhumanity to throw reproach on them after their decease (*b*); and having done the feudal duties without objection, the objection comes too late when the personal dishonour ceases, and to the next person in possession no reproach can arise.

If bastards could be any where alledged in the pedigree after the decease of the parties, there would be no end of contention concerning them, and genealogies would be rendered perfectly uncertain; for there being no established registry of genealogies in the feudal, as

(*a*) [See *ante*, p. 20. N. XIX.]

(*b*) [See 1 *Salk*, 120. *Pride v. Earls of Bath and Montague*.]

was in the *Jewish* law, they conceived that the greatest evidence that could be of the legitimization of the ancestor, was the uninterrupted enjoyment, and the carrying the same by course of descent to the issue. Hence they would not suffer this rule by any means to be shaken, lest all descents should be rendered precarious; but if any part of the rule fails (*c*), then the right of possession is only gotten by such descent, and not the right of propriety; as if the possession be once interrupted by the mulier, if the bastard eigne re-enters, this only gets the possession, and by such descent the issue only acquires a *jus possessionis*.

[31]

So if the bastard eigne leaves a child *in ventre sa mere*, this shall not inherit; for though there the ancestor had an uninterrupted possession, yet there was no descent.

But if the mulier abates (*d*), the issue of bastard eigne hath both right of possession and right of propriety, because of an uninterrupted possession, and descent complete, the law casting the freehold on the issue, before his entry, or before the mulier can abate. Nay, this rule is preferred to the privilege of infancy (*e*), so that if the mulier were an infant, yet the descent of

Ld. Raym. 174.

(*c*) [See *Watk. on Desc.* c. 4. p. 144.]

(*d*) [See *Watk. on Desc.* c. 1. s. 1. p. 34.]

(*e*) [See *Plowd.* 372, and the books cited in the margin of the English edition.]

[32]

the issue of the bastard eigne should bar such infant, because it is by the laws of descent that the infant himself inherits (*f*); and he himself could not claim, but by supposing that uninterrupted possession of his ancestors (*f*), and the consequent descent gives him a right. But if the person in the principal case were not legitimated, by the ecclesiastical law, his entry gives him no title, but as another disseisor; for he is an absolute stranger by all laws, and reputed *nullius filius*.

Litt. sect. 402,
3, 4, 5, 6.
Id. Raym. 35.

As to infants, feme coverts, persons *non compos*, the descent to the heir of the disseisor doth not take away their entry, because the infants, &c. had a right possession, and the act of law cannot take away that right, since no laches can be imputed to them; since their negligence is not culpable, it were unjust to make market of their titles; and therefore the lord, when he takes a relief, is not supposed to transfer any *jus possessionis* to the heir of the disseisor, since the feud is not supposed, by negligence and want of a tenant, to fall into his hand, and from thence to be relieved to the heir of the disseisor, who hath title thereunto, since if that were doctrine, a negligence were supposed in these incapable persons, which the law doth not allow.

(*f*) [See N. XXVI.]

But

But the *non compos* in this case cannot alledge the disability in himself (*g*), because he cannot be supposed conscious of it; nor is he allowed ever at any time to alledge it: for when he is once *non compos*, there is no certain time when he can be adjudged to recover that disability, unless where he is legally committed, and then the acts during his lunacy will be set aside and discharged, and afterwards the commission superseded; for in no other way can the *non compos* be legally restored to his right, and to his capacity of acting.

[33]

If an infant disseises, this only gives him a naked possession; for he has no privilege to do wrong; and if he alien in fee, his alienation is voidable. If the alienee dies seised, he may enter; for though the descent gives a right of possession against the disseisee, yet it gains no right from the infant. If then the infant recovers, he is a disseisor as he was before, and being only in his former estate, he has no right of possession against the disseisee.

Litt. sect. 407,
8.
Strange. 939.

If a disseisor, that has only a right of possession, makes a feoffment in fee on condition, and the feoffee dies seised, this gains a right of possession to the heir of the feoffee. But if the condition be broken, and the feoffor enters, he destroys the estate, and the right of possession

Litt. sect. 409.

(*g*) [See 2 Bl. Comm. c. 19. p. 291. and n. (2) to Co. Litt. 247. a.]

annexed to it; and he being only a disseisor, is in his old estate, which is a naked possession, without any right at all.

[34]
 Litt. sect. 410. A civil death, such as that of entering into religion, doth not take away an entry; for this seems to be the voluntary act of the ancestor, or rather a contrivance between ancestor and heir, to acquire the right of possession; and a man that hath done wrong, shall not by his own act acquire to himself a right.

Litt. sect. 411. A lease is a covenant real, that binds the possession of lands into whose hands soever afterwards they come (*b*), if the lands be not evicted by a superior title; but the termor has not the freehold in him (*i*), but holds the possession, as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Therefore if such termor be ousted, and the freeholder disseised, the disseisor has the naked possession bound by the covenant; and if afterwards a descent be cast, the heir of the disseisor has the right of possession, bound also by the covenant; for the heir of the disseisor has only the right of possession which was in the disseisee, and that was bound by that covenant, and therefore it must be bound by the same covenant in the hands of the heir of the disseisor;

(*b*) [It shall bind the lord on escheat; see 8 Co. 45. *a*. F. N. B. 198. K. 221. B. See Post. 299. N. CLIII.]

(*i*) [See *Watk. on Desc.* c. 3. s. 1. p. 108.]

and were it otherwise, the right of the termor would be intirely destroyed; for he cannot have a right of possession distinct from the right of propriety. [35]

Now then, if the termor enters before the descent, he reverts the freehold in the disseisee, who has the right of possession; but if he enters after the descent, then he can only hold in the name of the freeholder who has the present right of possession, which is the heir of the disseisor. Ld. Raym. 853.

In the times of domestic wars, when the courts of justice are not open, the descent gives no right of possession, though the disseisin was done in time of peace. For it were in vain for a disseisee to exert his right of possession, when the courts of justice are not open; nor can there be any such thing as the act of law to give a right of possession, when the law itself is silent; but in times of foreign war, when there is justice and peace at home, a descent will give a right of possession; for to encourage enterprizes in such war was such privilege given to the heir of the disseisor (*k.*) Litt. sect. 412.

A succession doth not give a right of possession, as a descent doth; for a successor is in by his own act; for it is by his own concurrent act that he comes to be installed into the rights of his predecessor, and therefore he can have no more than he had; [36] Litt. sect. 413.

(*k.*) [See *ante*, p. 24.]

Co. Litt. 34.
99. a.

but since the predeceſſor had a naked poſſeſſion, and not the *jus poſſeſſionis*, the ſucceſſor can have no more. Beſides, the ſucceſſor pays no relief, unleſs by grant or preſcription: for eccleſiaſtical lands were not relieved into the hands of the lord for want of a tenant, being given in free alms, or to do ſervice by proxy; and ſince the lands are not relieved into the hands of the ſucceſſor for a conſideration paid, he doth not acquire a right of poſſeſſion. Beſides, there is no reaſon to encourage the predeceſſor to dare in war, who either went not at all, or elſe by proxy; and therefore no reaſon ſuch ſucceſſion ſhould get a right of poſſeſſion.

Of CONTINUAL CLAIM.

[37]
Litt. ſect. 414,
415.

IF a man be diſſeiſed, and the diſſeiſor die in peaceable poſſeſſion, immediately after ſuch diſſeiſin (*l*) the heir acquires *jus poſſeſſionis*, if the diſſeiſee ſuffered the anceſtor quietly to enjoy (*m*); for then the preſumptive right is in the heir; but if the diſſeiſee has re-entered within a year and a day before ſuch deſcent,

(*l*) [“ Diſſeiſin”—This ſhould be *deſcent*, and refers to the death of the diſſeiſor in the peaceable poſſeſſion.]

(*m*) [See N. XXVII.]

then

then the heir doth not acquire the *jus possessionis*. First, because there is no laches in the disseisee, and the act of law would do wrong and injury (which it cannot do) if it should alter the right when the disseisee has done what in him lay to continue the right of possession. Secondly, because there is no presumption that the disseisor had right, if the disseisee continue the claim; for the law cannot presume the right of possession to be derelict, contrary to the manifest act of the disseisee. Thirdly, the lord ought not to take the heir for his tenant; and there is sufficient warning for the ancestor in his lifetime not to do the voluntary service, nor for the heir after his decease to pay the relief.

(n) If the vassal renounces the feud, this is a cause of forfeiture by the old feudal law, because it was saying they would not do the feudal services that were the perpetual consideration for such possession, nor keep within those restrictions required by the feudal contract, which were the original design of the gift. *Vassallus, si feudum vel feudi partem aut feudi conditionem ex certa scientia inficiatur, & inde convictus fuerit,* [38]
Litt. sect. 416.

(n) *Revertitur terra ad dominum capitalem, vel ad rectum dominum, scilicet ad ipsum de cujus feodo est.* Glanvil. lib. 7. c. 17. p. 59.

Rescendit ad capitales dominos a quibus primo processit. Bracton. lib. 5. c. 6. fo. 375. [See *Wright's Ten.* 115. n. (g).]

eo quod abnegavit feudum ejusq; conditionem, expoliabitur (o). But when distresses were invented (p), then the land itself was not seised for neglect of services, because they had this method of compulsion. But if tenant for life had aliened in fee, there was no redress but by a seizure of the land itself; and therefore this cause of forfeiture in our law was restrained in [to] the alienation of tenant for life.

[39] If tenant for life makes a feoffment, or levies a fine, it is palpably contrary to his oath of fidelity to the reversioner, and therefore that is a plain renunciation of the feud. So in the case of the remainder, the estate for life is drowned in the fee; therefore the estate for life is renounced, and the remainder commences. So if tenant for life of a rent levies a fine, this is a forfeiture; for though the fine being of a rent, passes no more than it lawfully may; yet being a public and solemn renunciation of the estate for life in a court of record, it is within the reason of the law, and amounts to a forfeiture, and the remainder man anciently was to claim within the year.

Litt. feff. 417,
418.

The entry is the same thing as the *vendicatio* or *calumnia* in the civil or feudal law; and this entry was of equal solemnity with the feoffment: for as the feoffment was anciently made

Stra 1076.
Ld. Raym 779.

(o) [See the *Intrad.* p. xviii.]

(p) [See N. XXVIII.]

on the land *coram paribus* (q), who subscribed the feudal instrument in the *hiis testibus*; so it seems the entry was made upon the land, and afterwards the claim was recorded in the lord's court, and hence called *clameum*, or *calumniam*, *apponere vel advocare*. Vid. Digest. Feud. lib. 2. tit. 8.

But afterwards they allowed the feoffment to be good, though it was attested *per extraneos*, and not *coram paribus*; and the entry was allowed to be good, if made upon the land, though it were not recorded *coram paribus*; but the manner of recording the claims of liberties before the justices in eyre remained long after, [40] as appears by the *Register* 19. b. which seems to be a continuance of the ancient practice. See *Spelm. Gloss.* tit. *Calumnia*, fo. 97. But when the feoffments were not attested by the *pares*, [*curiæ*,] yet they were attested and tried by the *pares comitatus*; and therefore if the land lay in two counties, there must be livery in each of them: so if the land lies in two counties, the entry must be in each, because the attestation of both facts, if controverted, must be by the *pares comitatus*. Ld. Raym. 166.

Livery within view, and entry afterwards, is equal to a livery on the land itself; and if a man cannot enter for fear of outrage (r), yet it Litt. fec. 419^a
420.

(q) [See N. XXIX.]

(r) [*i. e.* To his person. See *Co. Litt.* 253. b.]

is good; so also is a claim within view good, when a man fears to enter; for in both cases a man ought to take possession where he can, because it is the change of possession makes the notoriety in both cases. But if the disseisor menace war to the person that hath right, then the law, which doth not compel to impossibilities, allows him to make his claim as near the land as he durst come.

Litt. sect. 411,
2, 3, 4, 5.

[41]

The notion of the laches, in not claiming for a year and a day, is taken out of the feudal law; so is the express words of *Frederick*, touching the tenant's claim of his lands from his lord. *Præterea si quis infeudatus major quatuordecim annis sua incuria vel negligentia per annum & diem sieterit, quod feudi investuram a proprio domino non petierit, transacto hoc spatio feudum amittat.* Digest. Feud. lib. 2. tit. 55. fo. 543. Vigelius 241. 255—487. And the reason why this time of a year and a day seems to be set by the feudal law is, because the services appointed seem to be annually completed; and therefore that was the time for the vassal to claim from his lord; and the same time that he had to claim from his lord, he had to claim from any disseisor, for the uniformity of the law; and that the lord might know who was the person that he might take for his tenant, and that the lord might receive his feudal fruits from the heir, in case the disseisor died. And if the tenant lost the whole feud, in case he did
not

not claim within a year and a day, it is fit he should lose the right of possession, in case he neglects his claim upon the disseisor in the same space, that the heir may be in peace, and that the lord may receive him as his tenant. For that was by the ancients thought to be a violent presumption of dereliction, both in the one case and the other. But our law, since it gives a distress for all feudal duties, doth not presume the feud derelict, in case feudal services are not paid, since the lord has a power to compel the payment; and therefore the law doth not induce any forfeiture in that case. But the law gives the right of possession to the heir, in case the disseisee doth not claim within the space mentioned, because there the presumption remains of the dereliction of the disseisee, since the entry or action is the only way that he has to obtain possession. But if the disseisee enters within a year and a day before the descent cast, though there were twenty mean disseisins, yet the entry is not taken away; for there can be no *jus possessionis* in the heir, if the disseisee has continued the possession by those solemn acts that the law requires, and within the time that the law builds a presumption of a dereliction, if the disseisee neglects his entry. But if the disseisor at common law had kept possession forty years, and the disseisee had entered but half a year before his death, yet in that law, as *Litt.* remarks, the heir had not gained the right of possession, be-

[42]

[43]

cause no dereliction can be presumed, if the disseisee claims within the time prescribed by the law. And if the law cannot presume that the disseisee has deserted the right of possession, it cannot be transferred to the heir of the disseisor; nor ought the lord, in such cases, to accept of his services from such heirs. Nay, *Coke* (*s*) says that the feoffee of the disseisor that comes in by title after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because they came in by title; and for quiet of purchasers, this non-claim for a year and a day was held a dereliction. Hence writs of entry against the feoffee in the *per & cui*. But this was not held so in respect of disseisors, because they themselves being the wrong doers, had no law in their favour, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession, and therefore they construed the feoffee that came in by his own act, to be a wrong doer, and not to alter the right of possession; but the heir, for the reasons aforesaid, was left as before.

Litt. sect. 426.

If the disseisor dies seised within a year and a day (*t*) after the disseisin, and before any entry

(*s*) [On *Litt.* 238. a. 256. a.]

(*t*) [See *ante* 37. N. XXVII.]

by the disseisee, this gives a right of possession to the heir, because when the disseisee yields up the possession peaceably, the presumptive right is in the disseisor; for it is to be presumed that the disseisee would return again to his possession, [44] if he were not conscious that his adversary had the right; wherefore there is no time given after such disseisin, for the disseisee to assert his right; for it is to be presumed he would do it immediately, if he has the right of possession in him, and the rather, for that men have the quickest sense of injuries immediately after they are committed. So that the giving up the possession tamely, and yielding to the disseisin, makes a strong presumption for the disseisor's right, and, by consequence, the law must take the right of possession to be in the heir of the disseisor, and the lord is bound to accept him as tenant, and to relieve the tenements into his hands. But if the disseisee had re-entered, then he had asserted his own right of possession by such his entry; for *affectio imponit nomen operi*; for the law cannot suppose the disseisee to have relinquished his right against his own express act to the contrary. And if the disseisee has not deserted his right, the lord ought to attend to the solemn claim made by him, and not relieve the tenements into the hands of the heir of the disseisor; and if he doth, it is null and void, and cannot give him any right.

Litt. sect. 430.
Ld. Raym. 62.

If a man be disseised, he may have an action of trespass against such disseisor for the act of entry, because the disseisee being in actual possession, and taking the profits, violently to enter and take them away must be a transgression, and the destruction of a man's goods and chattels is punished in this action. But after such disseisin he can have no trespass for the mean profits, for the mean profits follow the possession; and the person that resides in the feud is entitled to all the profits of it; because the burthen of the feudal duties is laid on him while in possession, in defence of his stock on the ground; but when the disseisee enters, the disseisor is a trespasser *ab initio*; for from the time of his entry the disseisee is in of his old title, and seated in his rightful feud as he was before; and therefore for all the intermediate time it was a violation done to the profits of his feud, since it was originally so; and he is in as from the beginning.

21 Co. 51.
Co. Litt. 257.
19 H. 6. 27, 8, 9.
2 Rol. Abr. 550.
Stra. 596.

Ld. Raym. 229.
476.

If a man has the frank tenement in law in him, yet he shall not have an action of trespass before entry (*u*); as the heir shall not have an action of trespass against the abator before entry; for the possession (*w*) of the heir cannot be

(*u*) [*Plowd.* 142. *b.* *Hob.* 224. 2 *Esprin. N. P.* 91.
3 *Bl. Comm.* 210. *c.* 12. See further, *Com. Dig.* Trespass (B. 3.), and 20 *Vin.* Trespass (S), and next note.]
(*w*) [See N. XXX.]

abated before he is actually possessed; for no man can be said actually to enter, till the actual possession is in him, and no man can be a trespasser to that possession the law casts upon him, which is only a possession *de jure*, and is not capable of an actual violence. Besides, no chattels by our law can descend, and therefore he has a right to the grass upon the ground only as it is part of the freehold; and since he never entered on the ground till the chattels are severed, he can have no right to them at all, because he cannot shew that the possession of them was ever in him, or any person from whom he can claim them; and therefore no violation can be done to such possession by taking them away. But if a man be disseised, and his entry be taken away, he can never recover the mean profits; for then the right of possession is out of him. The heir of the disseisor is feudary to the lord, and has a lawful possession, and the disseisee can never re-enter to make him a disseisor (*); and if the disseisee has no right to enter on such possession, he can have no right to the profits of such possession, but the right is in the heir to undergo the duties of the feud. But if a man were disseised, and the disseisor made a feoffment in fee, and afterwards the disseisee had entered, he might have had an action of trespass against the feoffee, because

[46]

2 Rol. Abr. 559
19 H. 6. 28.

2 Rol. Abr. 559

(*) [See *ante*, 37. N. XXVII.]

this

this is a continuation of the same violence to the issues and profits that belong to him, that was first begun by the disseisor. *Cro. Eliz.* 540. *Mo.* 461. 2 *Rol. Abr.* 554. *Licet* 10 Co. 51. 1 *And.* 352. *Hob.* 98. 1 *Rol. Rep.* 101. *Godb.* 388. are to the contrary. It seems not doubted that the old law was otherwise, of which I shall deduce a brief history.

In [the] *Saxon* times the right of propriety seems to have been only recoverable by a writ of right, as the right of possession was recovered by a writ of entry; and Sir *William Herle* himself tells us, that the particular writ of entry of *cui in vita* was not anciently known, but they recovered in that case in a right of right. 5 *Ed.* 3. 58. 2 *Inst.* 343. The process in both these actions were alike, viz. by summons, *grand cape* before appearance, and by *petit cape* afterwards. But the battail (y) was in the writ of right, where the property was doubtful; but in matters of plain and obvious right, as were those of possession, they did not appeal to providence. And it is to be noted, that the process and proceedings in those actions were not then so tedious, when the courts were held from three weeks to three weeks, and the process issued at every court day. But after the conquest, all causes were drawn into the king's courts to

(y) [See N. XXXI.]

create the greater dependance (z); and then the process issuing from term to term was found very dilatory. Hence the assise was invented (a) to do justice to the people in their proper counties, by the king's judges, and to determine the matter at once. From thence it is said by *Glanvil*, *Bracton*, and *Fleta*, to be a new-invented remedy. *Glanv. lib. 2. c. 7.* *Fleta* 214, 215. And that it was of *Norman* original, appears by the *Customier* 16. b. But the writ of entry retained its old process, and therefore fell into disuse, as brought against the disseisor himself; and when it became thus obsolete, the writ was called a writ of entry, in the nature of an assise, as though that had been the elder action; or rather because both being of the same kind, the assise was a bar to the writ of entry, & *vice versa*; for both, as brought against the disseisor, supposed a right of entry in the disseisee, and no action could be brought above once by the law for the same thing; wherefore one action was given once only for the right of possession, and once for the right of propriety. But a man might bring one action for his own right, and another for his ancestor's right; for such rights

: *Ld. Raym.* 9.: *Ld. Raym.*
273.

(z) [See the *Introd.* p. xii. *Millar's View*, b. 2. c. 3. p. 325. *Dalrymple*, F. P. c. 7. f. 1. *Kaims's Hist. Law-Tracts*, Tr. vi, vii. 1 *Rob. Cha. V.* f. 1. p. 71, &c.]

(a) [See 3 *Bl. Comm.* c. 10. p. 184. c. 22. p. 341. c. 23. p. 351. *Stuart's View*, b. 1. c. 2. f. 4. n. 5. p. 273. 4. b. 2. c. 1. f. 2. p. 338.]

6 Co. 7. b.

[49]

1 Inst. 153.

2 Inst. 248.

of possession were distinct and different the one from the other. When the feud became farther to be considered as a civil right, from henceforth it was not thought necessary that the feudary should cast himself on providence, and defend his military possession by battail. Then it was thought fit to make a change in the action; and for three descents and three alienations a man was allowed his writ of entry (*b*); because the disseisee, being the rightful proprietor, should not be forced to a combat; but after three descents it was thought that more than half the right was paid for by fines and reliefs to the feudal lord; and therefore the disseisee was put to his writ of right, to assert his right of propriety; and every body knows that the writ of entry in the *post* came in by the stat. *Marlb. c. 30*.

Whether the other emendations in these actions were made by the justiciar, chancellor, or parliament, is uncertain, but no damages were recovered but against the disseisor himself (*c*), either by assise or writ of entry, till the stat. *Glocest. c. 1*. because the disseisor received the purchase money, and ought to answer the da-

(*b*) [See 3 *Bl. Comm. c. 10. p. 181*.

Possession for one hundred and eighty years, a term rudely supposed commensurate with three generations, gave a right among the Britons. *LL. Henl Dda*; and see 1 *Whit. Manch. c. 8. l. 4. p. 277, 8.*]

(*c*) [See 2 *Inst. 286.*]

gages,

ages, and because the feoffee came in as an innocent man, and paid his fine to the lord, and even came in in default of the disseisee himself, he not preventing it but by his entry; therefore no damages were allowed till the said statute.

When the fines for alienation were worn out, [50] and they found the prejudices of secret feoffments, which were made anciently, as is said, to acquire a right of possession, and before that statute to excuse damages (*d*). 2 *Inst.* 284. *Hob.* 48.

And here it is to be known that the disseisor hath the naked possession (*c*). The feoffee has a colourable possession coming by title, and the heir has the right of possession. The reason why the feoffee's title was formerly allowed, though he came in by wrong, is, because he anciently paid a fine to the lord (*f*); and therefore anciently, if he continued in possession a year after such purchase, the feoffee of the disseisor gained the right of possession: the history whereof will be proper here.

(*g*) By the ancient feudal law, no man could

(*d*) [This passage is not clear; perhaps the word "and" should not have been inserted in the second line.]

(*e*) [See 2 *Bl. Comm.* c. 13. p. 195, and *ante*, p. 21.]

(*f*) [See N. XXXII.]

(*g*) *Ex jure feudali non minus dominus prohibetur ab alienatione sui domini directe sine consensu sui vassalli, quam vassallus ab alienatione feudi, & utroque casu pari poena & hic & ille punitur, ille amissione directe domini, hic, utilis.* Feud. lib. 1. tit. 22. [See *Wright's Ten.* 30. n. (*c*).]

alien

[51] alien without a licence from the lord of the fee, and this licence was part of the notoriety on such alienations. And if they alienated without such licence, the feud was forfeited. Nor could the lords part with their manors and services without the attornment of their tenants, lest they should subject them to their neighbouring lords, between whom there might be a deadly enmity, which quarrel might be made up between the two lords, but might subject the feudary to the mercy of the alienee. That this was the ancient law touching the feud, is plain from all the ancient accounts of this matter. *Vide Vigelius* at large, *lib. 5. cau. 34. fo. 288.*

But in *England* (*b*), where the allodial property had very much prevailed in the *Saxon* times, they soon revived the free liberty of the alienations without fine, in three cases. First, *in remunerationem servitii, viz.* for services done to the feud, as for serving in the wars by the feudal tenant, or in plowing the feud at home, both these being either for the honour or profit of the feudal lord, they formerly valuing themselves upon the number and honour of their tenants. Secondly, in free marriage with the daughter of the feudary, or some other of his blood; and this was allowed without fine, because the feud was given in fee to provide for

(*b*) [See N. XXXIII.]

relations,

relations, and multiplied tenants to the lord. Thirdly, in free alms, the superstition of the times allowing it for the good of the soul; of which see *Glanv. lib. 7. c. 1. fo. 44. Stamsf. Prærog. fo. 27, 28.* But in all these cases the alienation was to hold of the feudary, and he was to leave sufficient to answer the feudal services; and this privilege was confirmed by act of parliament, and made more general; so that the feudary might alien to whom ever he pleased, so that sufficient was left to answer the lord's services; and this seems to be a privilege mightily contended for; though after it was found inconvenient that the tenure should be of the feudary; and therefore was altered by the statute of *Quia emptores*; but the king not being particularly named, the tenants *in capite* were held to be out of the statute (*i*); and therefore by the statute *Prærog. Regis, c. 12.* it was settled that such tenants should not forfeit their lands for such alienations, but should be levied by process out of chancery; so that it is plain that formerly such fines were paid in case of every private lord; but the attornment conti-

[52]
Mag. Chæ.
c. 34-

(i) [*Wright's Ten. 162. F. N. B. 211. I. 235. A. Dalrymple, F. P. c. 2. f. 2. p. 57, &c. Sulliv. Lect. xii. p. 118. xv. p. 146. 150. xlili. p. 386. 2 Bl. Comm. c. 19. p. 289. 2 Inst. 501.*

But it was said, that as the statute was made in favour of the lord, he might have dispensed with it, if he pleased. See the *Stat. and Brooke Ten. 2. F. N. B. 211. I.]*

nued,

nued, of which hereafter ; and *vide Stamf.* 27, 28, 29. 9 *Ed.* 3. 29.

Ld. Raym. 862.

Where the maxim was delivered by *Wilby*, that the service of one man's body cannot be changed into another man's body without the assent of the lord of the fee.

[53]

Litt. sect. 444,
5.

Of RELEASES.

WHEN a disseisin is committed the possession and right are separated ; but they may by a lawful conveyance be again united. Now when a man has the right and possession in him, he must convey by feoffment, which made a notoriety among the tenants, by the feoffment *coram paribus* (*k*). When a man was out of possession, he might convey by release only ; for the disseisor had the possession, which of itself made the notoriety, and the release transferred the right ; so that a release is a conveyance of right to a person in possession ; and this comes instead of a feoffment ; for a man cannot be put in possession, which is the operation of the feoffment, when he is in possession before (*l*).

(*k*) [See *ante*, 39. N. XXIX. and *Post.* 69. 83.]

(*l*) [See N. XXXIV.]

A release of all a man's right supposeth that he has right, for he cannot transfer a right which he has not; for if he has nothing, nothing can pass by the conveyance; and they thought it countenanced maintenance to transfer possibilities. But if the heir releases with warranty, it bars him when the right descends; for the warranty is a covenant for the defence of lands by a man's own act made equal to a feudal contract, and therefore repelled the party himself or his heirs from claiming it, since he was bound to defend it to another; of which see *Hale's Succes.* 57. and tit. *Warranty*. But though a man cannot transfer a right that has no being, as he cannot release to the bail before judgment, or to the conusor of a stat. all his right in the land before execution; yet when that which was esteemed a possibility takes the being of a right, as the remainder of a term of five hundred years, it may be released, because the notion of the possibility has vanished by the certain establishment of the term. 10 *Co. Lambert's case*, 47, 48.

Litt. sect. 446.
 Ld. Raym. 786.
 Ld. Raym. 1306.

[54]

A man cannot release but to the tenant of the freehold (*m*); for the presumptive right is in the freeholder (though he comes in by disseisin) during his possession; and the lessee for years takes and retains the possession but as his bailiff; and since the action and entry are only

Litt. sect. 447,
 8.

(*m*) [See N. XXXV.]

on the freeholder, he only is capable of a release, and the lessee for years is a stranger. But if a man has a freehold in law I may release; for then the law casts the possession upon him, and he has the presumptive right. *Vide post. sect. 510.*

[55]
Litt. sect. 449,
450, 1, 2 3.

Releases are fourfold, either enuring by way of *mettre le droit*, extinguishment, enlargement of estate, and *mettre le estate*. First, by way of *mettre le droit*, and this either to the disseisor himself, or to the feoffee coming in by title, or to the heir of the disseisor. Where a man releases to the disseisor himself, it alters the right; but where to the feoffee, it does not alter his title; for the disseisor coming in by wrong, the possession is only in him, and there is no notorious title, but only the bare possession; and therefore a release makes good that possession, by making of it rightful. But the feoffee comes in by title, and therefore the release cannot alter the title; for the feoffment being a notorious act, must be defeated by an act of equal notoriety, before any alteration can be made in such title. Therefore if there be two disseisors, and the disseisee release to one of them (*n*), he shall hold out his companion, because the disseisor comes in by no lawful or established act of notoriety, which ought to be defeated before the manner of possessing can be

(*n*) [See N. XXXVI.]

altered;

altered; and therefore though he possessed as a joint-tenant before the release, yet after the release he shall oust his companion, because he was possessed of the whole before by wrong, and now being possessed by right, it follows that the possession of the other wrong doer is no possession at all. But if a disseisor had infeoffed two, the release of the disseisee to one should enure to both, because coming in by the legal notoriety of a feoffment, that must be defeated by an act of equal notoriety, before the title can be altered, because the feoffment must stand good, as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears that the freehold is in another. [56]

Litt. sect. 472.

Now since the freehold is not defeated in this case, the feoffment continues, and the release enures to them both. Another reason given by the Lord *Coke* is, that they may have opportunity to take advantage of their warranty, which will happen if they be defeated by action or entry; for then if the disseisor refuses to give a plea in *warrantia chartæ*, they shall recover in recompence, which could not be practised, if the feoffment were defeated by the secret operation of the release. By the same rule of reason, where a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life, or to the remainder-man, this enures to them both, be-

cause

[57] cause coming in by feudal conveyance, it cannot be altered, unless it were defeated by an act of equal notoriety.

If a disseisor makes a lease for life, and the disseesee releases to tenant for life, this shall enure to him in reversion, because the release cannot alter the estate that passed by the feudal feoffment, without some act of notoriety by which that feoffment is destroyed; so if there be two disseisors, and they make a lease for life, and the disseesee releases to tenant for life, this shall enure to them all, because the release cannot alter the feudal feoffment.

Co. Litt. 276.

If there be tenant for life, the remainder in fee, and tenant for life is disseised by two, and he releases to one of them, he shall not hold out his companion; for if he had a rightful estate for life by the release, then the remainder would be revested: but the remainder cannot revest without some act of notoriety; for where there is a notorious possession by wrong, that may receive a release of the right, without any act of notoriety, because the possession is in itself a notoriety, but the estate cannot alter without some act of notoriety, so that men may know in whom the fee is lodged; and therefore one of the disseisors doth not take an estate for life, and revest the remainder; for he to whom the release is made hath a longer estate than the releasor; and so, should he be tenant for life, the release would enure by way of grant of his estate.

[58]

estate. So if the remainder-man had released to one of the disseisors, he should not hold out his companion; for if the releasee might hold out his companion, the estate for life gained by wrong would be left in both, during the life of tenant for life, since the remainder-man could not by his entry overthrow it during the continuance of the estate for life; and whatever right is acquired during the continuance of the unlawful possession, is acquired to them both: for if one were to acquire the whole right in remainder, there would be no notoriety of the beginning or determination of the estate for life in the other disseisor. But if tenant for life, and he in remainder, join in a release to one disseisor, he shall hold out his companion, because when the possession is notoriously in them both, each of them is capable of a release; and when one has obtained a release, it makes his possession rightful; and his holding out his companion makes it immediately notorious, that the estate is in him alone. Nay, if the disseisors make a lease for years, and the disseisee releases to one of them, this shall enure to them both, [59] because he cannot make it notorious that the estate is in him alone, because he cannot hold out his companion during the continuance of the lease for years. So if two joint-tenants are disseised by two, and one releases to one of them, he shall not hold out his companion, because he cannot hold him out of the whole, because

because he has not the whole right; and so there can be no act of notoriety, whereby the estate may appear to be in one disseisor.

Co. Litt. 275,
276.

If the king's tenant for life be disseised by two, and releases to one of them, this enures to both, because he can only be disseised of an estate for life, since the reversion in the king cannot be divested. If there be tenant for life, remainder for life, remainder in fee, and he in remainder for life disseises the first tenant for life, and the first tenant for life dies, the disseisin is merged; for since it appears by the notoriety of the feudal contract, that he is in his remainder for life, it must follow that he cannot be to himself a disseisor of such remainder; and if he cannot divest the remainder, the disseisin must cease with the possession of the first tenant for life.

[60]
Co. Litt. 276.

Littleton also says in these sections, that if there be tenant for life, the remainder in fee, and they are disseised, the tenant for life cannot release to him in remainder, because the naked right cannot be transferred. Having considered how this release shall operate, as to the disseisor himself and his feoffee, the third thing to be considered is, how it shall operate as to the heir of the disseisor.

The disseisor has the bare possession, and the feoffee has the bare possession, but he hath it by title, and therefore the release to *them* serves instead of the delivery of the possession by feoffment;

ment ; but such release passes the right of possession as well as the right of propriety ; but the heir of the disseisor has the right of possession in him ; therefore the release of the disseisee only passes the right of propriety. If therefore the heir of the disseisor be disseised, and the disseisee releases to such disseisor, and after the heir recovers against such disseisor, the right of propriety goes along with it, because when the heir recovers, he defeats the possession of the disseisor, as if it had never been, and then can he never recover in any action ; for in the writ of right he must lay the possession in himself, or some of his ancestors, and this he cannot do in this case ; for here never was any possession in him, but what was totally defeated and destroyed ; and he cannot recover by the old possession of the disseisee ; for that was turned into a naked right, which could not be transferred but to a real and true possession ; and here being no possession but such as stands defeated, it is the conveyance of a naked right, which cannot be ; and were it allowed, would be a particular cause of maintenance in these cases. [61]

But if donee in tail discontinue in fee, the reversion in the donor is turned into a right : now, if the donor releases to the discontinnee, and the tenant in tail dies, and the issue in tail recover against the discontinnee, yet he leaves the reversion in the discontinnee of necessity ;

for the issue in tail can recover but an estate-tail; and as the donor might have granted the reversion while the tenant in tail was in possession, so he may release it to the discontinnee, who has the right of possession. But [if the] disseisee enters upon the heir of [the] disseisor, and infeoffs *A.* and the heir recovers against *A.* he hath gained the right of propriety; for *A.* cannot recover back against him, *causa qua supra*. But if the disseisee disseise the heir of the disseisor, this doth not get the right of possession; [62] but if the heir recovers the right of possession, it leaves the right of propriety in him as before; for there is no reason, in this case, [that] the right of propriety should be carried along with it: for since the right remains in him unmoved, and not transferred over to any person, he can recover by virtue of the old seisin, that was lawfully in him, though this new wrongful possession be defeated and destroyed. Therefore also if the heir of a disseisor be disseised, and the second disseisor infeoffs the heir apparent of the disseisee at full age, and the disseisee dies, and then the heir of the disseisor recovers against the heir of the disseiser, yet the right of propriety continues, because though the new and wrongful possession be defeated, yet he may recover the right of propriety by force of the ancient rightful seisin that was in his ancestor.

If the heir of the disseisor be disseised, and the disseisee releases to the disseisor, upon condition, and the condition be broken, this reverts the naked right in the disseisee, because when the condition is broken, the release is as if it had never been, and therefore the disseisee may recover by virtue of his ancient seisin.

If disseisee disseise the heir of the disseisor, [63] and make a feoffment in fee, on condition, if the heir enter before the condition broken, the right of the disseisee is gone for ever; for when the feudal estate that passed by the feoffment is defeated, the condition thereunto annexed is destroyed, and is incapable of being performed or broken, and the right can never revert in the disseisee, but upon breach of the condition, which is now become impossible; therefore the right can never revert in him at all, and therefore he can never recover by virtue of his old seisin, and the feoffee cannot recover, *causa qua supra*. But if the condition had been broken, and the disseisee had entered, the old right had been reverted; and if the heir had entered upon him, he might have recovered by virtue of his Co. Litt. 266. ancient seisin.

Secondly, Of RELEASES that enure by way of EXTINGUISHMENT.

If a man be disseised, yet he remains tenant in right to the lord; but the disseisor is the ap-
parent

Litt. sect. 454,
5, 6, 7, 8, 9-
460, 1, 2, 3, 4.
Ld. Raym. 515.
518. 522. 786.

[64]

9 Co. 21.

parent tenant in possession; and the lord may, if he pleases, still avow upon his rightful tenant; for before the statute of *Quia emptores*, the lord was not obliged to change the body of his tenant. *Stamf. Prærog.* 28. and now he is not obliged to change his tenant, but in case of lawful feoffments (o), and tender of arrears; and not in the case of disseisin. Therefore if a man be disseised, and the disseisee puts in his beasts upon the land, and the lord takes them for rent arrear, the disseisee shall compel him to avow upon him; and if the lord avows upon the disseisor as his tenant, the disseisee shall reply, and shew the especial matter, how he was tenant and was disseised, and shall abate the lord's avowry, because the feudal contract has still a continuance between the lord and tenant, and the wrongful act of the disseisor shall not destroy it; but if the tenant be disseised, and the lord accept rent from the disseisor, and then the lord distrains his beasts for rent in arrear, he may compel the lord to avow upon him, because he may plead that any stranger infeoffed him, and that the lord accepted rent; and the lord cannot, contrary to his own acceptance, traverse the title that he has admitted by such acceptance. But what if after such acceptance the disseisee should put in his beasts, and the lord should distrain them, can the disseisee com-

(o) [See *ante*, p. 52.]

pel him to avow upon him? *Coke* is of opinion that he cannot, because it is the tenant's own laches he let the disseisor continue till rent was thus due and accepted; but the opinion of the 48 *Ed.* 3. 9. seems to be contrary, and that he must avow upon the disseisee, because when the tenant pleads the disseisin, to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. *Quare*, and see the book of *Ed.* 3. For after acceptance, whosoever beasts he take, by the book he seems to be obliged to avow upon them to maintain his distress. *Co. Litt.* 268. 20 *H.* 6. 41 *Ed.* 3. 2 a. 2 *Ed.* 4. 6. but very plain it is, that before acceptance he shall be compelled to avow upon the disseisee, if he puts in his beasts, and the disseisor cannot compel him to avow upon him, though he takes his beasts on the premises. So in the case of wardship or escheat. He may take either heir or either title before acceptance, but after acceptance he cannot enter for the escheat of the disseisee's right, because he has taken another tenant. It is also plain, that if the disseisor dies seised, the heir of the disseisor comes in by title, and then the disseisee cannot compel him to avow upon him; for he has lost the right of possession; [65] and the disseisee cannot put his beasts upon the ground, and therefore cannot compel the lord to avow upon him; and therefore the lord must take

Co. Litt. 269.

[67]

take the heir who has such right of possession, to be his rightful tenant; but because the disseisee may enter and occupy the land before the descent cast, therefore the lord may release to him, and discharge the contract, which is to his benefit, and is still so far subsisting, that he may take advantage of it. So where donee in tail releases to the disseisor all his right, yet if he in the reversion releases to him afterwards, it shall extinguish the rent. So where tenant in tail makes a feoffment in fee, though the tail be discontinued, because the statute that forbids alienation continues the relation of lord and tenant, notwithstanding the alienation. But if there be lord and very tenant, and the tenant makes a feoffment in fee, and afterwards the lord releases, this release extinguishes nothing; for the feudal relation is not subsisting after alienation (*p*), and the feoffor only of necessity becomes tenant in the avowry till the lord procures his arrears. If there be tenant for life, remainder in fee, and they are disseised, and the remainder-man releases to tenant for life, this release passes no right, as is said, because the remainder-man is out of possession, and such a right cannot be transferred, but it serves to extinguish the right; for he may extinguish the benefit that accrues to him by the feudal contract. *Co. 1 Rep.* It is here to be noted, that

(*p*) [See N. XXXVII.]

before the statute of *Quia emptores*, if a man had aliened, the feud was forfeited, but afterwards that was compounded for fines; but the lord could then only demand a certain composition; and because the tenant had sworn fealty, he could not withdraw himself out of the feudal service during life, but after the death of the feoffor, the lord was enforced to take the feoffee for his tenant; for the lord could not introduce the heir into the feud, contrary to the alienation of the ancestor. And after the statute of *Quia emptores*, the lord could avow upon the feoffor till the arrears were tendered; but both before and after the statute, by acceptance of the feoffee, he became his tenant; for it is a plain consent to the alienation. So in Terms; if a termor assigns, and the landlord accepts rent from the assignee, he can have no action from the termor, because the rent is a service, which being taken from the assignee, establishes him in the term, and he cannot demand the service but from the tenant of the land; but where there is no such acceptance, if the termor assigns in his life-time, or the executor after his decease, yet an action of debt lies for the rent against the executor; for a term for years being the smallest estate, is presumed to continue in person, and the contract is supposed to be performed by that person, unless he accept another tenant; and that person has a continuance to perform all contracts as long as there is an executor

executor that represents him, and has assets to perform his contracts. 5 Co. 24. 1 Sid. 266. But a man may have an action of covenant on the covenants in the lease, after the acceptance of the assignee for his tenant; because though the acceptance discharges the tenant from the action of debt, because it discharges the service by accepting another, yet without legal words and a solemn contract in writing, the covenant cannot be discharged; for *Solvetur eo ligamine quo ligatum est*. Cro. Jac. 309. 522. Cro. Car. 188. 465, 6, 7, 8, 9, 470.

[69] Thirdly, Of RELEASES that enure by way of
ENLARGEMENT of the ESTATE.

And here it is to be known that all feudal estates passed, as is said, by feoffment, where the contract was solemnly made *coram paribus* (q) with the utmost notoriety, that all persons that had right might have the utmost notice against whom to bring their actions: but when the feud came to be inheritable, then it was necessary that there should be conveyances to pass the estate, where the feudary had parted with the possession for a limited time; as also for the lord to pass the services of his feudal tenants. Now this could not be by feoffment,

(q) [See ante, 39. N. XXIX.]

because

because such persons had not the possession to transfer (*r*). Consequently it was necessary that they should pass by grant, where the parties had the utmost notoriety that the matter was capable of, which anciently made a notoriety three ways. First, by attornment or consent of the tenant (*s*), which was required, lest the lord that had often deadly feuds with his neighbouring clans, should compound the matter by the alienations of some of the feudaries, who might be forced into the fealty of another lord, with whom they had anciently contended. Secondly, the notoriety was made by the payment of services, which being anciently corporeal, it was easily seen who was the feudal lord, because the military tenants attended the lord in person in the wars, and the socage tenants ploughed and manured the lord's grounds, so that when granted it was easily seen where the service was paid. Thirdly, a notorious possession; the estate of which may be enlarged. Fourthly, by fines for alienation, which gave notoriety to such contracts (*t*), which grew obsolete by alienations to hold part of the feud; and afterwards by the statute of *quia emptores*, that gave power at all times to alien, holding of the superior lord; but the former causes of notoriety

[70]

(*r*) [See *ante*, 53. N. XXXIV.]

(*s*) [See *ante*, 50. and *post*. 81.]

(*t*) [See *ante*, 50. N. XXXII.]

still continue. Now a release to the particular tenant from the lord from whom he holds, is equal to a grant and attornment, for the services go over to the superior lord, and there needs no attornment; for the tenant's accepting the grant is an attornment, and acceptance and consent is presumed to a grant made to himself, unless the contrary appears.

[71] If *A.* makes a lease for life, and lessee for life makes a lease for years, *A.* releases to the lessee for years, and his heirs, this is void, because here is not the consent of the tenant for life, who is immediate tenant to the reversioner, and ought to attorn, and therefore this estate ought to pass by grant and attornment: so it is if a man leases for twenty years, and the lessee assigns for ten years; but if a man makes a lease for years, the remainder for life, and afterwards releases to the tenant for years, this is good, because the tenant for years holds of the reversioner, and pays him the services, and ought to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a release of the reversion, it must in consequence be good; but in that case a release to him in the remainder for life is good, because the lessee, in the original infeudation, took the estate for years, subject to such remainder for life, and therefore there needs no consent from the lessee for years, to enlarge the estate into a fee. But a man must

not only have an immediate relation, but he must have the notorious possession of the estate, as tenant for life has by the feudal contract; for if he hath not the possession, but has assigned it over to another, there can be no such notorious possession upon which a release should enure; for it would destroy the solemnity of contracting, if the release should pass the estate, and charge the tenant, when the party was not really in possession. Thus tenant by the curtesy is tenant to the heir* by the law, which he cannot alter by his own act; so he remains tenant to the action of waste, and to attorn to the grants of the reversioner, notwithstanding assignments; because the estate is merely created by the law; yet he is not capable of a release (u), because he has no notorious possession *in pais*, which may be enlarged into a fee. So if an infant makes a lease for life, and the lessee assigns it over to another, with warranty, the infant at full age brings a *dum fuit infra ætatem* against the assignee, and he vouches the assignor, who enters into the warranty; the demandant cannot release in fee so as to enlarge the estate, because the vouchee has no possession.

N. B. As in feoffments there was required the word *heirs* (w), to distinguish the feud from

[72]

* [" To the heir."—It ought to have been—" To the lord." See *Walk. on Desc.* ch. 1. s. 3. p. 83.]

(u) [See N. XXXVIII.] (w) [See *ante*, 3. N. VIII.]

such as were not hereditary ; so it must be inserted in releases that only come in place of the feoffment, in cases where the possession was transferred before.

Fourthly, *Of RELEASES that enure by way of*
MITTRE LE ESTATE.

[73] When two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such feudal contract by a release, because no notoriety is needful, since there was a sufficient notoriety in the prior feudal contract ; and such a release is called a release by way of *mettre le estate*. Thus two coparceners come in, as it is said, to one entire feud, and descending from their father ; and therefore they may release privately to each other, without any notoriety by feoffment ; because they take by reason of the former contract, and descent to them, which establishes them in the possession, without a notoriety. But since the coparceners do also transmit distinct estates to their children, they may pass such estates by feoffment ; for they have, in respect of the descending line, distinct estates, which they may pass by a distinct feoffment ; but joint-tenants can only pass the estate by release, and not by feoffment, properly speaking ; for they are in by the first feudal contract ; and

therefore a second feoffment cannot give any other farther title or notoriety, because every person shall be supposed to be in by the elder and most worthy title, which is the prior feoffment; therefore the second feoffment is impertinent (x). Nor is this any injury to a stranger's *præcipe*, for he may bring it against them all, according to the prior feudal contract; and if any of them disclaim, the rest must defend for the whole, or lose their interest. But if there be two tenants in common, they cannot release to each other, but they must pass their estate by feoffment; because this estate being established by different notorieties, each having passed by distinct liveries, they must pass to each other by a distinguishing livery, or else it cannot be known in whom such parts are, which formerly had passed by a distinct livery (y).

Booth. 33.

N. B. That releases that enure by way of *mitre le estate*, need not have the word *heirs* (z), because the parties are not in by such release, but by the former feudal contract, which passed an inheritance, and the release only discharges the pretensions of one of them.

Co. Litt. 273.
b. 200. b. 169.

(x) [See *ante*, 53. (4).]

(y) [And against tenants in common there must be several *præcipes*, they having several freeholds. *Co. Litt.* 195. b.]

(z) [See *ante*, 3. N. VIII.]

Of CONFIRMATION.

Litt. sect. 515.
Ld. Raym. 300.

CONFIRMATION is the approbation or assent to an estate already created, which, as far as is in the confirmer's power, makes it good and valid: so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words that are foreign to the business of confirmation, and by their own force and power tend to create the estate.

Sec. 516, 517.

A release passes away the right from the releasor, and by that means may consequentially strengthen the estate; but a confirmation primarily strengthens the estate, and consequently so far as the estate continues, makes it good against the confirmer. If my tenant for life makes a lease for years, I cannot release to the lessee for years, because there would want the attornment of tenant for life, and therefore the right must pass, as is said, by grant and attornment, and not by release; but I may confirm the estate of tenant for years, for there wants nothing but my assent to corroborate the estate already in being.

[76]
Sec. 518.

I cannot release to the termor of the disseisor, because he is a perfect stranger to the freehold; so that the release is to one that has no right or possession

possession of his own, and therefore it is to him a release of a naked right; but I may confirm that estate which is already in being in him.

If a man confirm the disseisor's estate for an hour, this passes the fee, even without the word *heirs*, because the disseisor has the fee (a); and when that estate is assented to, the disseisee can never afterwards destroy it. So if he confirm the term (b) of the lessee of the disseisor for some part of the years, he cannot defeat it during the whole term, because the term is confirmed; and the last words being derogatory from his own grant, must be rejected; but if he confirms *the land* to the termor, for part of the term and no longer, this is good, because the party that had right, did not totally assent by express words, as he did in the two former cases; for if he did, no derogatory clauses from such assent could be admitted; but his assent was originally but partial, and not to the whole estate, and therefore it cannot, contrary to the express words, be carried any farther. Sect. 519, 520.

If a man releases to tenant for life all his right, this enures to him in the remainder, because he parts with his whole; and he that has but an estate for life by the feudal conveyance, cannot have the whole fee, as is said. But if a man confirms the estate for life, it is an approbation and assent to that estate only, and there- Sect. 521.

[77]

(a) [See *ante*, 22. N. XXI.] (b) [See N. XXXIX.]

fore the assent being no farther than to the estate for life, it cannot be carried to strengthen the remainder; but if he had confirmed the remainder, that had confirmed the estate for life by implication; because the remainder cannot be without a particular estate to support it, therefore the confirmation of the remainder must imply an assent to all means necessary to support it.

Sect. 522.

If a man confirm the estate to one of the disseisors, he only has the estate as he formerly had it, which was jointly with the other disseisor; but if he confirms the estate of one disseisor in the lands, to have and to hold the lands, or his right to him and to his heirs, then such disseisor shall hold out his companion; for such *habendum* explains the manner of his confirmation, *viz.* that he should not hold the estate merely as it is, but in a manner more beneficial for him, that is, that he should hold the possession that he has *per my & per tout* to him only; for the *habendum* explains the assent, *viz.* that he should hold the possession sole; so

[78]

that the possession in the whole being confirmed to him only, he has the total right to such possession, and therefore may hold out his companion.

Sect. 523.

If one joint-tenant confirms the land to the other, this makes no alteration; for he confirms the estate in the same manner as it is; but if it be to have and to hold such lands to such joint-tenant

OF CONFIRMATION.

78

tenant only, he has a sole estate; for then he expresses a design of confirming the possession to him alone; so that the confirmation goes to the possession itself, by the explanatory words in the *habendum*, and not to the manner of possessing; and the words of the *habendum* make the confirmation enure as a new grant of such his moiety (c).

Where a man has an estate but for life, and he Sec. 524. in the reversion confirms the estate to him and his heirs, the confirmation as to the heirs is void, because the estate is only confirmed, and nothing new is granted by such confirmation, and the estate can continue but for life only; but if it had been to have and to hold the land to him and his heirs, that had amounted to a grant of the fee; for then there appears to be a farther intent than merely to confirm the estate, *viz.* to enlarge it to him and his heirs; and taking the grant strongest against the grantor, it must pass away the fee-simple.

So where I let lands for life or years to a feme [79]
sole, who after marries, and I confirm the term Sec. 525, 6 to the husband and wife, for their lives, this amounts to a new grant of the term for the life of the husband; for I not only confirm the old term, but erect a new one, since the words im-

(c) [This properly operates as a release, and not as a confirmation. See *ante*, 75. *Fitzh. Abr. Confirm.* 15. *Tenchst.* 314.]

port more than a confirmation of the old term ; for in that the husband has nothing in his own right.

Sec. 527, 2, 9,
530.

If my disseisor, or my tenant for life, charge the land with a rent-charge in fee, and I confirm it, I shall for ever afterwards hold it charged, because I have assented to the estate, which has a being from such disseisor or tenant for life ; and therefore I cannot afterwards destroy it.

Sec. 532, 2, 3.
Id. Raym.
49, 50.

If I only use the words *dedi & concessi*, that is as strong as the word *confirmavi* (d) ; for it amounts to a grant of the right to the person in possession ; and if he has my right, I can never after impeach his estate.

Sec. 534.

Here (e) the heir of the disseisor grants the right of possession, and the disseisee the right of propriety ; for every one grants what he lawfully may.

Sec. 535, 6, 7.

The lord by confirming the estate doth not pass his right to the feignory, because the confirmation or assent to that estate cannot be interpreted to pass that other distinct right which is in him, since the assent to one estate is no reason to conclude that he has parted with the other ; but if he had released all his right, he had extinguished his feignory, because by such

[80]

(d) [See Co. Litt. 301. a. 2 Anderf. 20. 2 Sand. 96. 2 Brownl. 292. Cowp. 596. Butl. Addit. note (1) to Co. Litt. 384. a. Peff. 80. (g).]

(e) [See N. XL.]

remitting his right, he could not have demanded any thing (*f*).

The lord may abridge the services of his tenant by his confirmation, but he cannot enlarge them or create new services; for when he has confirmed the estate by lesser services, he has granted to the tenant the services that are over and above what was specified in the confirmation; because confirming the estate to hold by lesser services is, by implication, a grant or release of the rest; for he could not hold by lesser services, unless the rest were released; but if he confirms to hold by greater or new services, this is void, because this doth not amount to a new grant from the lord. Sect. 538, 90!
542

If I confirm a villain to another that has him in possession, this passeth nothing, because this is an incorporeal right, which cannot be divested out of me, and the mere confirmation, where a man has no right, is really nothing; for that which is not, cannot be merely confirmed; but if there be the words *dedi & concessi*, it goes farther than merely to strengthen the estate in the lands, for it passeth the right to the rent (*g*). Sect. 541, 2, 36

(*f*) [See N. XLI.]

(*g*) [See *ante*, 79. (*d*).]

Of ATTORNMENT.

Lit. sect. 551.
 Bracton, l. 2.
 c. 35. f. 13.

(b) ATTORNMENT is the consent of the tenant to the grant of the feigniory, or the reversion, putting him into the possession of the services due from such tenant. The reason is threefold. First, From the ancient feudal law (i). When the feignories subsisted in their ancient clans, they used to be continually contending with each other; and it was frequent in those times to make peace upon amicable concessions to each other; but if upon such grants they should have subjected any feudaries to the other lord, it might have been to the infinite prejudice of such tenants; for though such contending lords might agree, yet the grudge might continue to the tenants; and therefore the policy of that old law was, that their fealty was not to be carried over to any other, without their consent, from whom they might expect oppression rather than protection,

[82]

(b) The doctrine of attornment was partly avoided by the present method of conveying to uses. *Vide Stat. 27 H. 8. c. 10.* And it is now, by a late statute for amendment of the law, quite abolished. *Vide Stat. 4 Ann. c. 16. f. 9.* [See *Wright's Ten.* 171. and n. (f), (g). and *Stat. 11 Geo. 2. c. 19. f. 11. Dougl.* 282, 3. & n. (1) to *Co. Litt.* 309. a.]

(i) [See *ante*, 39. N. XXIX. 50. 69. and *post.* 84. 90, 91.]

Secondly,

Secondly, That the tenant might know to whom the rents and services were due, and to distinguish the lawful distress from the tortious taking of his cattle; and this reason was so prevalent, that when the law gave a free alienation, in respect of the superior lord, yet the tenant's right of attornment continued unaltered.

Thirdly, That by the tenant's lawful payment to the grantee of such feigniory or reversion, he might be put into possession of such feigniory or reversion; and that by the payment of such rents, and doing of such services, which anciently lay in going to the wars with their lords, and plowing their grounds, all men might know in whom such rights were vested. And here the most general rule is, that the tenant cannot alter the grant, but only attorn to it; and by such his attornment, can make no variation in the grant itself: for the tenant has no right to the reversion, and therefore cannot alter the disposition of it one way or the other; but he has a right to the possession, and therefore can put whom he pleases into that possession which he has in him.

If the lord grants the services to one, and afterwards, by a deed of later date, grants them to another, the tenant may attorn to which he pleases; for the feigniory or reversion in such cases vests in the lord or reversioner till attornment; for by the deed nothing passes till the grantee is put into possession by the attorn-
ment,

[83]

Lit. sec. 552, 3.

Strange 79.
Ibid. 106.

ment, no more than a deed of feoffment passes the feud before the feoffee be put into possession by livery ; so that if he that has the last deed has the first possession, he is the feudary, because by the notoriety of the livery *coram paribus*, the feud passeth. So when it is a reversion or feignory, which do not lie in livery, it must pass by the notoriety of the tenant's attornment : so if a man grants a reversion in fee, and afterwards grants it to another for life, the tenant attorns to the grantee for life, he shall never attorn to the tenant in fee ; so if a man grants a reversion in fee upon an estate for years, and after confirms the estate to the tenant in tail, he shall never attorn to the grantee ; because, after the acceptance of such confirmation, he cannot put the tenant in possession according to the grant, because the reversion is altered by such his acceptance ; and when he cannot put the grantee in possession of the thing, as it was granted, he can make no attornment at all ; for his attornment cannot vary or alter the original grant ; and if the tenant could alter the grant by his attornment, no body could tell by such grants in whom the feignory or reversion was lodged ; and so the notoriety of the attornment, as correspondent to such grants, would be altogether destroyed. And it is highly probable, that as their liveries were anciently very notorious *coram paribus*, so were their attornments also ; and such grants *coram paribus* were read and remembered ;

bered; and if the attornments were not to correspond with the grants in all things, it would have caused infinite perplexity and quarrels to have adjusted such differences.

If the reversion be granted to one for life, the remainder to another in fee, if the tenant attorns not to tenant for life, he cannot attorn to the remainder-man; because, if there be no particular estate, there can be no remainder; and there can be no particular estate, unless the tenant gives him possession by his attornment.

The rule that governs these cases is, that he that owes the services must make the attornment; and therefore where the tenant in fee makes an estate for life, yet he remains tenant to the very lord, and must attorn to the grant of the feigniory; but if he makes a lease for life, the remainder in fee, the tenant for life must attorn to such grant; for this is an alienation in fee (k); and so by the statute of *Quia emptores* they must hold of the very lord; for since the statute no man can erect a new tenure (l); and a new tenure would be created, if the tenant for life were to hold of the remainder-man, and he were to hold over; and the words of the statute carry it for tenant for life to hold of the chief lord. *De cetero liceat cuilibet homini libero ad voluntatem vendere, ita quod feoffatus teneat terram illam de capitali domino feodi illius per eadem*

Co. Lit. 31a.
Litt. sect. 554
5, 6, 7.

[85]

(K) [See ante, 66. N. XXXVII.]

(L) [See N. XLII.]

servitia & consuetudines per quæ feoffator tenuit.

Now the tenant for life is properly the feoffee in this case, and therefore is to hold of the lord, and by consequence must attorn to the grant of the feignior; and since he holds by the services of the whole fee, he makes an attornment as the very tenant, and there needs no subsequent consent of him in remainder. If the tenant be disseised, yet such disseisee shall attorn to the lord, because the feudal contract continues. But to the grant of a rent-charge, or a rent-seck, the tenant to the land must attorn, because it is only

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the land is liable, and no body else, but as tenant of the lands; and therefore the land being to yield the rent, it is the tenant of the land only that is to consent to such grants, and put the grantee into possession; for no man can put him into possession of rent issuing out of such land, but the tenant of the land itself. Therefore if there be very lord, and very tenant be disseised, and the lord grant the rent off from the other services, the disseisee cannot attorn to this grant, because it becomes a rent-seck in the grantee; and then none can attorn but the tenant in possession of the land that is to pay it, because he must be put into possession by the tenant of the land; but if the lord had granted all the services, the disseisee might have put the grantee in possession by attornment; because the tenant may be compelled to do the services, being still tenant by the feudal contract, and may compel the lord to

avow

avow upon him; but he is not compellable to pay the rent, which is turned into a rent-seck, but as he is tenant of the land, which he is not after the disseisin.

If a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life, this shall enure to him in the remainder; for the release, as is elsewhere shewn (*m*), cannot alter the notoriety of the feudal feoffment; but the release of the feudal lord to the tenant for life shall not enure to him in the remainder; for the feudal feoffment is not prejudiced, and stands in full force, whether it enure one way or the other, and therefore it shall enure to the benefit of him that purchased such seignior; and he would not have the benefit of the total purchase of the seignior, if the release were to enure to him in the remainder; but if there be tenant for life, the reversion in fee, if the lord grants the services to the tenant for life, the reversioner must attorn, because he holds of the lord; but such attornment does not alter the tenure of the estate for life, for that cannot be altered in such attornment; for it cannot be thought that a bare assent to the grant should ever be interpreted to discharge the tenant out of his fealty, and to release all manner of services, without any words or deeds whatever. But the tenure, which the

Co. Lit. 311. b.
Litt. sect. 558,
9, 560, 1, 2, 3.

[87]

(*m*) [See the chapter on Releases, *ante*, 55, &c.]

tenant

[88]

tenant for life purchased, is superseded during the continuance of the estate for life, as to all the possessory fruits of such tenure; for the tenant for life cannot hold of the reversioner, and yet the reversioner holds of him; for he cannot exercise the prerogatives of a lord over one to whom he owes fealty (*n*), and therefore he can have no wardship, marriage (*o*), or relief of the reversioner; but if the reversioner dies without heir, it shall escheat (*p*), because the tenure of the reversioner is gone by his dying without heirs, and therefore the cause of the suspension is taken away; and therefore the tenant for life may have the fee without prejudice to any one; but the tenant for life may not grant the feigniory during the suspension, because the feigniory is drowned in the lands, and he has not an estate in the feigniory distinct from the land; so that the grantee can make no title during such suspension, because there are no services due from the reversioner during the continuance of the estate for life. But if the very tenant in fee make a lease for life or years to the lord, yet the lord may grant the feigniory, because the services continue, notwithstanding the lease; for the tenant holds the reversion of the lord as he did before; for the taking the lease

(*n*) *Craig. de jure feud.* 45, 46, 47. [See *post.* 152.]

(*o*) *Bracton, lib. 2. c. 36. Fleta, lib. 3. c. 77. stat. 1.*

(*p*) *Feud. lib. 2. tit. 24. Zasius in usus feud.* 83.

shall

shall be never interpreted as a destruction of the services that were before due to the lord, while the tenancy of the fee-simple has a continuance; but if the lord disseise the tenant, or the tenant make a feoffment to the lord, then he cannot grant the feigniory; for the lord by the common law, in the first case, and the statute of *Quia emptores* in the second, holds of the next superior lord, and he has no feigniory distinct from the land itself.

Co. Lit. 324.
564.
Vide post.
sect. 582.
Litt. sect. 565.

If a tenant gives a penny as attornment, this will not found an assise (*q*), because it is no seisin of the rent, unless he gives it *in the name of seisin*; but the grantee may have a writ of rescous, because the distress is lawful, being annexed to the services that pass by the attornment, and therefore the rescue is tortious.

The attornment of one joint-tenant is good, for both are tenants of the whole land, and the services are due for the whole land; and since the whole services are due from both, either may consent for the whole, and the distress grows to be notorious on the land for the whole.

Sect. 566.
Ld. Ram. 312.

The attornment must be during the life of the grantor, because otherwise the reversion descends to the heir of the grantor, who has the right in him, and never granted it out of him. *Vide post*.

Sect. 567, 8, 9.

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If either the tenant for years or for life in this case attorn, it is good, because the tenant for

Sect. 570.
Vide post. f. 582.

(q) [See Litt. f. 565.]

I

years

years holds the estate for years of the reversioner, and pays the services to him, and the tenant for life holds the freehold of the reversioner; so that both in different respects hold estates of him, and his release to either, as is said, is good enough. But here it may be asked on *sect. 569*. If there be tenant for life, remainder in fee, if he in remainder grants the remainder, why tenant for life must attorn, when he does not hold of the remainder-man, but of the very lord, as is said before, by force of the statute of *Quia emptores*; and the attornment must be made according to the tenure, by the rules aforesaid laid down. But though there be no tenure of the remainder-man, yet the attornment of the tenant for life is required for two reasons. First, because the remainder-man came in by the feudal feoffment, and therefore could not pass without the utmost notoriety, and this was by attornment *coram paribus*, and possibly such grants and attornments might be anciently made in their courts*; but however such notoriety was attributed to the attornment, that the feudal feoffment could not be altered without it. Secondly, because the action of waste, and the forfeiture of tenant for life, was to him in remainder; and since he lay liable to several actions to the remainder-man, it is fit that he should attorn to the grant, being to some pur-

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[* See *post*. N. XXXIII. and *Mad. Form. Angl. passim*.]

poses attendant to him ; though by the statute the feudal service was to be paid to the very lord.

But when secret feoffments were allowed before two or three persons, without being *coram paribus*, so were also secret attornments before two or three persons, without being *coram paribus* ; and by the same reason, if there was tenant for life, and he in reversion confirmed the estate to tenant for life, with the remainder to another in fee, this was good to vest the remainder ; for the accepting of this confirmation implied an assent to the remainder that was thereon limited ; but then it was necessary that it should be by indenture, and the remainder-man should have one part ; because otherwise the remainder-man would be never able to shew this grant, and the assent of tenant for life ; for the assent could not be shewn unless he had the deed to which he was party, and whereby his acceptance would appear to the court. Sect. 572, 3, 4, 5.

If two joint-tenants make a lease for life, they may afterwards release to each other without any attornment of tenant for life ; for since both of them have the reversion, the tenant for life is tenant to them both, and consequently there is no need of any subsequent consent to create a new tenancy ; and paying the rent, and doing the services to one only, is a sufficient notoriety, that the whole fee is in one only. So if there be tenant for life, the remainder for life, he in reversion may release to him

[92]

in the remainder for life; for there needs no notoriety to the first tenant for life, because he already assented to the limitation of the remainder in the original creation of the feud; and therefore there was no danger that he should be subjected to his enemy, and there is sufficient notoriety to all strangers by his holding of him in the remainder, as there was a sufficient notoriety in the first case of the confirmation, by the tenant's holding over of the feudal lord.

Litt. sect. 576,
7.

[93]

These sections (r) stand upon the most evident property of a feudal feoffment; for such feoffments cannot be defeated but by acts of equal notoriety to the feoffment; since the feoffment passes the fee by a notorious ceremony, it cannot be destroyed but by an act of equal notoriety, that is, by such an entry as defeats the whole fee; therefore if a man makes a lease for life or years, and then enters and ousts his termor for years, or disseises his tenant for life, and then makes a feoffment; if the tenant for life or years re-enter, he leaves the fee-simple in the feoffee without attornment; for the tenant for life or years by his re-entry cannot defeat the whole feoffment, because he has only a right to an estate for life or years; and if his act of entry cannot destroy the intire operation of the feoffment, then must some part of the

(r) [" These sections."—See *Litt. s.* 576, 577. The substance of them, as also of Lord *Coke's* Commentary, is given by our author in the next page.]

estate that passed by the ceremony of this feudal conveyance, be left in the feoffee. So it is if tenant for life or years recovers by ejectment or assise, yet he leaves the fee in the feoffee; for the entire operation of this feudal conveyance is not destroyed by this recovery; and if it be not destroyed, the fee must reside in him. But it will be objected, by this method a man may be forced to attorn to his enemy: *Answer*, It is better the tenant should receive some small prejudice, than the rules of feoffments, upon whose notoriety every man's estate depended, should be broken. Secondly, It is the tenant's own laches, that he suffered himself to be ousted or disseised; and therefore it is to be presumed that he was satisfied of the feoffee. But then how if they had entered *vi & armis*, and ejected him. *Answer*, It seems that then such subjecting to another, contrary to his will, should be considered in an action of trespass, and the tenant should be recompensed for it in damages.

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If a lessee for twenty years makes a lease for ten years, the second lessee cannot attorn to the grant of him in reversion, because he holds (s) of him; but if the reversioner enters upon such lessee, and makes a feoffment in fee, and the lessee re-enters, this leaves the reversion in the feoffee without attornment. 6 Rep. 69.

(s) [" Because he holds of him : " — Should it not be, " Because he does *not* hold of him ? "]

So if a man makes a lease for life, and then grants the reversion for life, in this case, if he were to grant the reversion in fee, the grantee of the reversion must attorn, because he immediately holds of the reversioner in fee; but if the reversioner in fee disseises the tenant for life, and makes a feoffment, and tenant for life re-enters, he re-settles himself and the grantee for life in their estates, and leaves the reversion in the feoffee; for the lessee for years, in the first case, and lessee for life in the second, by their entry, re-settle themselves and their reversioners in their estates; but they leave the remaining part of the estate in the feoffee, because as much of the feoffee's estate as is not defeated by their entry, must be left in him.

If two joint-lessees for years or life be ousted or disseised by the lessor, who makes a feoffment, and one re-enters, he leaves the fee in the feoffee, *causa qua supra*. If lessor disseise his tenant for life or years, and makes a feoffment, and the lessee re-enters, the rent thereon reserved is revived, and ought to be paid to the feoffee, because when the lessee enters, he must hold the particular estate of some body; and if he be in of the same estate he must hold by the same services; and since the feoffee is in by feoffment, he must hold as of his reversion. But if the grantee of a rent-charge disseises the tenant of the land, and makes a feoffment in fee, and the tenant re-enters, this can never be revived, because
the

the feoffor cannot have it again, contrary to his own feoffment, and the feoffee can never have it, because he was only seised of the land, and not of the rent, and the rent was never transferred to him.

Where a lease is made for life, the remainder in tail or for life, the remainder to the right heirs of tenant for life, tenant for life has the remainder in him, and he may grant it (*t*); otherwise it is where there is a lease for years (*u*), the remainder in tail or for life, the remainder to the right heirs of tenant for years, then the tenant for years cannot grant it; for the remainder is vested in the right heir as a purchaser. The reason of the difference is, that in the first case the tenant for life is tenant to the lord, being properly *feoffatus* within the statute of *Quia emptores terrarum*, as is said *sect. 554*. And therefore when a remainder is afterwards limited to the right heirs of tenant for life, such tenant shall be in the homage (*w*) of his lord, because he

Co. Litt. 319.
sect. 578.

[96]

(*t*) [*T. 11 Hen. IV. f. 74. b. pl. 14. Bro. Disc. 30. Graunter, 49. Scire Fac. 126. Fitzh. Feoffm. 109. Co. Litt. 22. b. 319. b. Jenk. Cent. 248. pl. 38. See 2 Atk. 57. 247. Dougl. 506. n. 1 Fearn, 30. 102. (4th ed.) 1 Vesf. 175—7.*]

(*u*) [*Co. Litt. 319. b. 1 Co. 104. a. 1 Fearn, 65. 482. (4th ed.)*]

(*w*) As to the antiquity of homage, it is very remarkable, that *William the First* (commonly called the Conqueror) about the twentieth year of his reign, just when the

he has an inheritance for which he ought to vow to venture his life, and the lord shall have the fruits of such feudal inheritance; for if the intermediate estate be extinct, during the minority of the heir, the lord shall have the wardship and marriage of him, and shall have the heriot of such tenant dying seised. *Vide Hale sur*
 [97] *Fitzberbert* 143. And by consequence the inheritance must be supposed to reside in tenant for life; and were the construction otherwise, it would apparently tend to the weakening the tenure and state of the whole kingdom. Therefore such interpretation ought to be made, as best supports the tenure, when the words will bear both senses. But in the second case, the tenant for years is not the *feoffatus*; for the person properly that takes by the feoffment is the freeholder, and the tenant for years is but the bailiff to the freeholder; and it is the freeholder that is attendant to the superior lord, may be in his homage, and that holds of him, and

general survey of *England*, called *Domesday Book*, is supposed to have been finished, and not till then, summoned all the great men and landholders in the kingdom to *London* and *Salisbury*, to do their homage to him. *Hale's Hist. of the Com. Law*, 109. *Madox's Hist. Excheq. fo. 6. in marg.* [At this period, the feudal system appears to have been generally and more completely established in this kingdom. See *Wright's Ten.* 46, &c. 52, &c. 2 *Bl. Comm.* c. 4. p. 48. *Sullivan. Lect.* xxviii. *Butl. n. to Co. Litt.* 64. a. f. v. (1.) and pref. and notes to *the Laws of Will. the Conq.* at the end of *Keban's Norman Dict.* p. 80, &c. *Law of Forf.* 49, &c.]

from

from whom the services are due. Therefore this remainder to the right heirs is not immediately vested in the tenant for years, because the heir is the first that can have the freehold, as feudal tenant to the lord; and therefore, by the words of the grant, he must be the first purchaser of such freehold; and because the tenant for years cannot hold of the lord, or the lord avow upon him, no other interpretation can be made. *Co. Litt. sect.*

Therefore if a lease be made to *A.* for years, with livery, the remainder to the right heirs of *A.* this is a void feoffment, not only because the freehold would be in abeyance, and there be no person for the stranger's *præcipe*; but also because there would be no person in the mean time for the lord's avowry, and to answer his services; and therefore such remainder must be void in the very creation of it; because there is no person in whom the freehold can vest; and if the act of notoriety doth not deliver over the possession of the freehold, it is a nullity in the very act of delivering possession, and altogether impertinent. So it is if such estate were limited by way of use executed; because if the feoffor does not part with the use out of him, the old use is executed on the feoffment; for the freehold cannot be in abeyance till tenant for years dies, and it does not execute in the feoffee without consideration; but it seems it were good by way of executory devise, if
the

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Ld. Raym. 314.
316. 523.

the contingency avoids a perpetuity, by happening during a life (x); because then there is no immediate transferring of the freehold, but it vests in the heir to answer the stranger's *præcipe* and the lord's services, until the contingency happens; and it seems it should be a good limitation in the case of a chancery trust (y), where the legal estate is in the feoffee.

Stra. 969. Ib.
996.

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But if tenant in fee makes a lease for years, life, or gift in tail, the remainder to his own right heirs, or executes such limitation by way of use, he is in his old reversion (z), because he never put himself out of the homage of his superior lord; for it shall not be construed a contingent remainder in the right heirs, because he has not parted with any thing in the reversion, but to his heirs, to whom a man cannot make a limitation; for he must have the fee in him in the mean time, till the contingency happens, and therefore must remain tenant to the lord, as he was before; and then it were a very hard construction to make this a contingent remainder only to destroy the fruits of the feudal tenure, when the ancestor held as very tenant to the

(x) [See N. XLIII.]

(y) [See *Moore*, 720. *pl.* 1006. *Cases Temp. Talb.* 151. 1 *Atk.* 590, 1. 1 *Fearne*, 427. 449. 18 *Viner*, Remainder, (C. 2.) *pl.* 3. (C. 3.) *pl.* 3. and *post.* 263. N. CXXII.]

(z) [See *Hob.* 29. 2 *Co.* 91. *b.* 18 *Vin. Rem.* (A). *Watk. on Desc.* c. 5. p. 168, 9. and *post.* 272. N. CXXVII.]

lord during his life. *Co. Litt.* 22. and *Hale* upon it. *Gro. Jac.* 590. 2 *Roll. Rep.* 196. 216. 3 *Leo.* 64. *Dyer* 7. *Popb.* 3. 1 *Co.* 130. *Moor* 118, 119. 284, 5. 720. 2 *Co.* 91. 1 *Co.* 104. *Cro. Car.* 24. *Hob.* 27. 30. 1 *Mod.* 96. 98. 121, 122. 1 *Vent.* 372. 382. 1 *Roll. Abr.* 827. 841. 2 *Roll. Rep.* 196. 216. *Bro. Feoffment to uses*, 338. *Dyer* 156. 237. 362. 235. 308.

It is here to be noted, that by fine the estate passes before attornment, and the grantee by fine shall have the wardship, or enter for an escheat or for forfeiture, before the attornment in the *quid juris clamat*; but he cannot distrain or have an action of waste, writ of entry *ad communem legem in consimili casu*, or in *casu proviso*, or a writ of ward, or of customs and services, the grantee cannot have before attornment; but what the lord may seize he is entitled to before attornment; as the heriot, wardship, &c. Now to understand this, we must go into the ancient manner of conveyancing, which was of two sorts; either by fine or feoffment. The fine was in the lord's court, and by this they passed all feudal right which was in possession; and there are instances as low as the time of *H. 2.* and *Ed. 2.* of fines in the court of the lord, *Madox* 15. (a) and they were called fines,

Sect. 579, 580,
1, 2, 3, 4

[100]

(a) [See *Madox, Formul. Anglicanum*, 217, &c. *Cruise v. Fines*, c. 1. s. 5. *Butl. n. to Co. Litt.* 64. a. s. v. (8).] because

because a fine was paid to the lord for such agreement (b), because it transferred the feudal right held of the lord. Now in such courts they passed all the right the tenant had in possession; but the right of action could not be transferred (c), because that would have encouraged maintenance; therefore whatever such grantee could seize past by this feudal conveyance, but the right of distress and of action did not pass without attornment. The feoffment conveyed the feudal possession *coram paribus*, out of court; for it was necessary to convey [101] sometimes before the court was held, and then the possession was delivered over *coram paribus*; but as there were two conveyances of copyhold, one in the lord's court, and the other to the customary tenants; so in freehold, where the immediate grant was to the feoffee, and not to the lord, as in the copyhold; yet there were two sorts of conveyances, one by fine in open court, the other by feoffment *coram paribus*: the right only passed by fine, because the possession being in the grantee, they might well stay till the next court to transfer the right; but where the possession was to be parted with, or

(b) [The reason of their being called *Fines*, is generally supposed to be from their putting an end to the suit and claim. See 2 *Bl. Comm.* c. 21. p. 349. and 1 *Cruise*, 4. and notes (b) & (c).]

(c) [See 13 *Viner*, Fine, (X). *Touchst.* 14. 10 Co. 50. a.]

service to be done, or money paid, there the usual way was *coram paribus*, that the feoffee might not lose the profits in the mean time, or the possession be delivered before the contract could be completed. Thus it stood some time after the conquest; but the after kings endeavouring to retrench the privilege of the great lords (*d*), they first in *Magna Charta*, and after by the statute of *Quia emptores terrarum*, began to admit of alienations without fine to the lord; and the acts of the court-baron were only esteemed [102] to create notoriety among the tenants of the manor. From hence grants in the lords courts were omitted, and the attornments *in pais* were the only notorieties of such grants, no fine being paid to the lord; and the king's courts creating a notoriety all over the land, the usual way was to make the grant in the king's court in this manner. They used to suppose that the parties had covenanted to alien; and all writs of covenant, as being an action of public concern to the justice of the kingdom, were sueable only in the king's court; and by consequence this covenant to alien was sueable there; and that court being possessed of the matter, as an adversary cause, they were admitted to make all manner of agreement touching such suit de-

(*d*) *Stamf. de Prærog. Regis* 28. a. [See *Wright's Ten.* 156. n. (*e*).]

pending (e); and these agreements being amicably made by way of composition before the king's court, it became the justice of the king's court to see them performed; and therefore a *scire facias* issued to execute the fine, and a *quid juris clamat* to the tenant; but by the fine nothing passed but what the grantor could seise, and not the right of action, for the danger of maintenance; but in the *quid juris clamat* the [103] tenant was compellable to attorn, unless he could shew that he was submitted to his enemy; so that here the provision made by the *quid juris clamat* was for the interest of the tenant; but the tenant was not compellable to attorn in two cases. First, if the tenant were tenant in tail; for he claiming such a right, as by possibility may continue for ever, is looked upon as master of the estate, and not bound to transfer the reversion according to the pleasure of the grantee. Besides, the statute law is, that the will of the donor be observed, and therefore they cannot compel him to transfer the tenure; but if he attorn *gratis*, it is good, because then it cannot be presumed to be to the prejudice of his issue. Secondly, the tenant shall not be compelled to attorn, if the grantee will not allow the privileges belonging to the estate; as the tenant shall not be compelled to attorn to the mesne, unless

(e) [See n. (1) to *Co. Litt.* 121. a. and n. (1) to 64. a. s. v. (8). *Cruise on Fines, &c.*]

they allow his privilege of acquittal against the superior lord. Nor the tenant for life, where he is not impeachable for waste, unless they allow that privilege, because this being a final agreement, with the utmost notoriety in the king's court, the tenant can have no new privilege, but what appears of record. So if the grantee sue a *scire facias* against the tenant, and [104] has judgment to execute the fine for any part of the services, it is an attornment for the whole; for the tenant had opportunity to plead in the *scire facias*, why he should not be compelled to attorn.

There needs no attornment to a devise, because these are by the customs of towns and boroughs for the promoting of trade, and do not require the notoriety of a feudal conveyance; and as no livery is required, where it is an estate in possession, so no attornment is required, where it is a reversion. Sec. 585, 6. Stra. 166.

Of a right a man cannot properly be disseised, though he may of his possession; for it is a contradiction in terms, that a man by wrong should have my right (*f*); therefore I cannot be disseised of a reversion, while my tenant remains in possession; for though my tenant should attorn to some body else, that would not put me out of possession of my reversion, be- Sec. 587, 8, 9, 590, 1.

(*f*) [And it is a contradiction also that a man should be disseised of that of which he had no seisin.]

cause

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cause the right being in me, it could not be transferred to any body else, but by some act of my own; and the payment of my tenant is but a wrongful payment, and doth not give him my right. So it is if I am seised of a rent-charge, and the tenant of the land pays it to another, this does not devert me of my right, because the wrongful payment of my tenant cannot alter my right; it is therefore a payment in his own wrong, and it still remains in arrear to me; but if I am disseised of the demesns of my manor, the services yet remain in me, because the right to the services, by the feudal contract, is not divested out of me by the wrongful possession of the demesns of my manor; but because all the feudal services are to be done in support of the manor, the knights services being the attendances of such tenants in the general defence of the realm, embodied under the lord of the demesns, that carried provisions to subsist them; and the socage services were the actual ploughing in the demesns of the lord; therefore if the tenants attorn to a disseisor, it puts him into the possession of such services, as accessory and belonging to the demesns of the manor; and if the disseisor die seised of such demesns as the principal after attornment, then the disseisee, as it seems, cannot distrain for the accessory right of the services; but though the tenant doth attorn to the disseisor, yet he may afterwards refuse, to avoid the

Ld. Raym. 862.

Hale's Hist. C.
Law, p. 107.

the double charge, because this does not take away the right of the disseisee, but that he may enter into the demeans, or distrain for the services (g); for till the right of possession is gained by a descent, the disseisee may recon-
 [106]
 tinue which part of the manor he pleases. If a man let parcel of the demeans for life, he is still lord of the manor, and the reversion is still parcel of the manor, because held of him as lord of the whole demeans, and therefore shall pass by a grant of the manor; but if a manor be leased for life, excepting black-acre, black-acre is not held of the manor; for it does not hold of such tenant for life, but is severed from the manor, and therefore will not pass by a grant of such manor; otherwise it is, if such lease had been made for years; for then the freehold had been entire, and one and all had therefore passed by the grant of such manor.

Of DISCONTINUANCE.

[107]

IT is an alienation of the possession, where the right of action is left in another; and it began in the case of the husbands alienations of their wives lands. By the civil law, the father

Sec. 592, 3,
4, 5, 6, 7.

(g) [See *Watk. on Desc.* c. 1. s. 2. p. 61.]

gave the *dos*, which was the estate of the wife, given on the marriage; and if it consisted of matters moveable, the husband had the possession, but was bound to restitution at his death; and even an action was allowed to the wife, in case the husband fell to decay, to recover during his life. If it consisted of things immovable, the husband could not alien without the consent of his wife, by the *Julian* law; and by *Justinian's* reformation, he could not alien, though with her consent. *Constante matrimonio rei dotalis dominium civile penes maritum est, naturale penes uxorem.* Dig. lib. 23. tit. 2. *De jure dotium.* Ibid. tit. 5. *De fundo dotali.*

Ld. Raym. 72.
1384.

Stra. 625.

[108] When the feudal law allowed the inheritance to descend to women (*b*), then began the rights of the husband to be settled. Now, since all the feudal estates were reckoned civil rights, therefore there was no room for the distinction of the civil law, that placed the civil right in the husband, as the head and governor of the family, and the natural right in the wife, the legitimate owner. The *German* and *Northern* nations were the strictest observers of the rules of marriage, tying only one man to one woman, and enjoining strict obedience to the husband, even before their receiving christianity, and much more so afterwards. Then when the woman was allowed to succeed into the feud,

(*b*) [See ante, II. N. X.]

when she took husband, she had no separate property, but the whole power was lodged in the husband, and they were reckoned as one in interest; therefore the husband had the right of possession, and the wife the right of propriety; or in other words, the husband was seised in the right of his wife (*i*); this distinction was before known in the feudal law; for every person that came in by descent, or by lawful alienation in manner before-mentioned, by the ancient feudal law, had the right of possession; therefore the husband being possessed of the wife's lands by the marriage contract (*k*), was supposed to have the right of possession; and by consequence the husband having aliened such right of possession, she was anciently driven to her writ of right, by the opinion of Sir *William Herle*, as I think by the better opinion, 5 *Ed.* 3. 58. 2 *Inst.* 343. for the wife could not complain of disseisin done to the husband, because they were one in estate and interest, and the husband could not do her wrong; and it would be very absurd for the law to have allowed to complain on the memory of her

Stra. 229.

Ld. Raym. 521.

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(*i*) [The most accurate expression is, that the husband and wife are seised in the right of the wife, the seisin being properly in *both*. See *Dougl.* 329. *Polyblank v. Hawkins*.]

(*k*) [For marriage, being originally with the approbation of the lord of the fee, was a direct acceptance of the husband as tenant. See *ante*, 12. N. XII. and *post.* 224. N. XCVII. 289. N. CXXXVI.]

husband, as though he had been guilty of a violent disseisin; therefore the ancient law gave no possessory action, which complained of a violation of possession, but only allowed her to controvert the right; but when the writs of right grew so tedious, and the trial by battail grew out of repute, the law gave her a recovery by the writ of entry of *cui in vita* (l); and the husband was the rather supposed to have the right of possession in him, for that being the superior and governing power, he might defend the possession by all actions; and therefore if the husband lost by default in a possessory action, this put the wife to a writ of right, as before, till the statute of *West. c. 3.* but now an actual entry is given to the wife and her heirs by the 32 *H. 8. c. 28.* (m)

[110] The prelates, abbots, and other ecclesiastical persons that attended the courts of the northern princes, received great favour and donations from them; and to aggrandize the church, and other political reasons, the celibacy of the clergy in those things was introduced; so that according to the superstition of that age, such abbots and prelates were supposed to be married to the church, in as much as the right of propriety was vested in the church, the estate being ap-

(l) [See *F. N. B.* 193.]

(m) [And, consequently, the writ of *cui in vita* has since become unnecessary; and see *F. N. B.* 193. in margin.]

propriated;

propriated; and the bishop and abbot, as husbands and representatives of the church, had the right of possession in them; and this the rather, because they might maintain the actions, and recover, and hold courts within their *manors* and *precincts*, as the entire owners; and that crowns and temporal states might have no reversions of interests in their feuds and donations. Therefore, since they had the possession in fee, they might alien in fee; but they could not alien more than the right of possession that was in them; for the right of propriety was in the church; therefore the bishop could not alien without the consent of the chapter, who represented the clergy of the diocese. Nor could the abbot alien without the consent of his house; but the parson had an estate only for life, and the fee was in abeyance; yet anciently he could alien with the consent of patron and ordinary.

Now to understand these matters aright, as also *sect.* 643, 4, 5, 6, 7, 8. it will be necessary to take a short view of the ancient state of the church. We find by the scriptures, that Christ instituted the apostles, and the apostles the bishops, and the bishops the presbyters and deacons, (first chosen by the church,) the presbyters to preach in the villages, and the deacons to gather the charities of christians. When a bishop died, the church chose out of the presbyters a fit person, who was consecrated by the neighbouring bishops. *Burnet's Rights of Princes,*

[111]

5, 6, 7, 8, 9, 10, 11. They lived also upon the voluntary oblations of christians, which they distributed among themselves and the poor, and being sustained by the people, were therefore elected by them. *Ibid.* 15, 16, 17. But in the time of *Constantine*, there was a select community, to make such elections. *Ibid.* 11, 12. And afterwards the people falling out about their elections, and the emperors having settled the salary of the heathen priests, and several other charities, on the christian priests, the elections were made by the emperor, or at least always assented to by him. *Ibid.* 46, 47. Afterwards when christianity revived, among the northern nations, the christian bishops being the courtiers of several princes, and having [112] begged great feuds for the church, they invested them into those great bishopricks to which those feuds were annexed; and gave them such investiture by the ring, virge, and staff, as a symbol of the feudiary dependance upon them (*n*). *Ibid.* 149. So that during the vacancy of a bishoprick, the king had the guardianship of the spiritualities, as he had the ward of his temporalities; so that if a vacancy happened, the king

(*n*) [See 2 *Spir. Laws*, b. 30. c. 21. b. 31. c. 9. *Sullivan*, Lect. viii. 1 *Bl. Comm.* c. 2. p. 155, 6. c. 11. p. 377, &c. *West on Peers*, 20. 2 *Tyrr.* 25. *Stu. Diff.* p. 3. f. 6. *Co. Litt.* 344. a. *Seld. Tit. Hon.* p. 2. c. 5. f. 14, &c. and the title *Lay Invest. of Bishops* in the late editions of *Jacob's Law-Dict.*]

had the right of presentation to such livings, where the patronage was in the bishop, and presented to the bishop succeeding. *Godb.* 264.

Shortly after, at the council at — (o) they endeavoured to set up tithes as a christian demand that had been anciently a tax to the eastern princes, and the priests and *Levites* in the *Jewish* theocracy. And whereas the bishops used to distribute their estate, upon oblations, by the ancient rules of the church, among their own presbyters and the poor; now they reserved the lands to themselves, and the profits of the lands and the tithes became an ample provision for the rest of the clergy; therefore encouragement was given for building of churches in smaller districts; and all such persons as built and endowed, were to have the right of presentation, the bishop condescending, upon such considerations, to fix the tithe, and the fixed residence of the priest, to the church, during his life, that was before only itinerary. [113]

Ibid. 113. But because the care of souls was only committed to him during life, he was not capable of the fee, and therefore the fee was in abeyance; so that there was this difference between the characters of the priests and bishops, that the bishops succeeded in their own original right, as the successors of Christ and his apostles, the great bishops of souls, and therefore what

(o) [The second council of *Mascon*, A. D. 585.]

they took was to themselves and successors; but the priests were only the substitutes of the bishops, and therefore could not take but during their lives. The parson therefore being only capable to take for life, for he had no proper successor to himself, the next parson coming in from the bishop, and by his institution; and yet the fee being out of the patron, and not given to the bishop, but appropriated to the use of that particular church, it was said to be in abeyance; but to all beneficial purposes, the law allows him to suppose himself to have an inheritance, though he has not properly any successor; and therefore the parson may bring an action of waste, a writ of entry *ad communem legem, in consimili casu, ad terminum qui præterit, a quod permittat in the debet,* [114] a writ of mesne, a *contra formam feoffamenti*, and shall receive homage, because these are for the benefit of the fee in abeyance; the defence of which the law has committed to him; but the law has provided him a *juris utrum*, and he shall not have a writ of right, since, for the reason above-mentioned, he cannot claim it as his right and inheritance.

But though the bishop sent out the presbyters to fill the cure, yet they reserved a number of presbyters; and as formerly all the presbyters were consulted touching the affairs of the church and the disposition of the church revenues; so now, when the presbyters were settled

settled in the parochial church, they consulted this select number, which anciently were ten; and these were allowed a stipend out of the church estate, called *præbendum*; thence they were called *præbendarii*, and the dean had his name *quia deus præpositus*.

When churches were thus regularly settled, the bishop began to assume a supreme power, and by many acts and new doctrines, set himself at the head of the church; and then he was willing to settle the election of the bishop in the chapter, and on their differences, to frame an appeal to himself. And in the wars, in the time of king *John*, they got this succession, that the king first gave the chapter leave [115] to choose, and then they should proceed to elect a fit person; this begot many controversies between the succeeding kings and the popes, but at last the kings prevailed, and only gave the chapter leave to choose the person they appointed.

Donatives are parts of the king's *regale* (*p*); for as he invested persons in their episcopal jurisdiction, so he could erect churches exempt from their visitation; for since the prince constituted the extent of the bishoprick, and gave the feuds that supported it, he could limit the bounds of such jurisdiction. Therefore before the parochial right of tithes were settled, he

(p) [See 2 *Bl. Comm.* c. 3. p. 23. *Co. Litt.* 344. a.]
might

might erect a donative with tithes and cure of souls; and at this day he may erect a chapel donative with lands, or impower any man to erect it (*p*), because he takes away none of the settled rights of the church. But such church or chapel must be consecrate, and such parson must have orders from the bishop, otherwise he cannot officiate in spiritual things; but such church (if presented to by the lawful patron) becomes presentative (*p*), because the bishop thereby takes upon him the cure of souls there, by the consent of the lawful patron; and then [116] by the rules of the christian religion, he cannot lawfully part with them. But if he take up the presentation from a disseisor of the manor, this makes no such alteration, for the bishop has not the lawful cure by such presentation; but the parson of such donative churches has the land only for life, after the manner of other presentative parsonages; for that is the intent of the erection; for the design of the prince is not to constitute a bishop to have perpetual successors, which power perhaps is not in the prince, but must by the rules of the church come from the successors of the apostles; but it is his design to erect a parsonage out of the jurisdiction of the bishop, which he may do, because he may determine the extent of the diocese; and being erected in analogy of a par-

(*p*) [Sec 2 *Bl. Comm.* c. 3. p. 23. *Co. Litt.* 344. a.]

sonage, the property must be supposed in him as in others. *Co. Litt.* 344. *Digest.* 197. *Godb.* 201, 202. 1 *Roll. Rep.* 2, 3. 6 *H.* 7. 13. *Britt.* 100, 103, 4. and from 205 to 250. and especially 238. (q)

The third sort of discontinuance is that of tenant in tail, and he is considered as the person that has the inheritance in him, and therefore has the right of possession inheritable. When therefore such tenant in tail makes a feoffment in fee, he alienates the right of possession; for though the statute *De donis* preserves the right of the heir, yet it does not preserve the possession; for it would have been absurd to say, that tenant in tail could have committed a disseisin upon his heir, who is to take by right of representation from him. Hence also the statute gives the formedon in descender, remainder or reverter, as the remedy to recover the possession, together with the right of propriety; and there is no action to recover the one distinct from the other; therefore the feoffee of tenant in tail has the right of possession, and the issue the right of propriety in him.

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There is also a farther reason of convenience why in all these three before-mentioned cases,

(q) [By stat. 1 *Eliz.* c. 19. 13 *Eliz.* c. 10. and 1 *Jac.* c. 3. ecclesiastical persons are disabled to alien, (except for a certain period, and in the manner prescribed in those statutes,) or to discontinue their livings, or the property which they possess in the right of their churches.]

the

the entry is taken away, because the feoffment had anciently a warranty (r) annexed unto it, which defended such right of possession; and when a man had a warranty to cover his possession, it was not fit he should be put out of possession by any act *in pais*, without bringing in his warrantor by voucher; and therefore the entry was disallowed in such cases, that a man might not be obliged to the expence of getting his judgment in the writs of *warrantia charta*.

Sect. 598, 9,
600, 1.

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If tenant in tail be disseised, and releases to the disseisor all his right, this works no discontinuance; for a release being a conveyance in secret cannot pass a possession; for a possession by the rules of the feudal law cannot pass without a notorious ceremony *coram paribus*, that the stranger may know in whom the fee is lodged, and against whom to bring his *præcipe*; as also that the lord may know in whom the fee is, that he may avow upon his tenant, so that the release can pass the right only. But the disseisor that has the possession, may take a release of the right, because he may make his wrongful possession rightful, if the disseisee conveys his right, and the stranger has no injury, since he must bring his *præcipe* against the tenant in possession, and the lord may avow on either, till notice of the conveyance and tender of arrears, and then must avow on the releasee

(r) [See N. XLIV.]

only,

only; since the statute of *Quia emptores*. But since the right of possession is in tenant in tail, why may not he pass the right of possession to the disseisor by such release? The answer is plain: A conveyance that cannot pass the possession, cannot pass the right of possession; for no conveyance can pass the right of possession distinct from the right of propriety, but such a conveyance that passes the very possession, which a release, being a conveyance without solemnity, will not do. But the harder question is, What estate hath such a disseisor, after such a release by tenant in tail? Some have said, that he has an estate to him and his heirs during the life of tenant in tail; so that then he has only a freehold, and the heir is a special occupant, and has no fee in him, because a less estate by right will drown a greater by wrong; for a man shall never be presumed to do wrong, when he may hold by right. 1 *Saund.* 261. Others have held that the disseisor has, in such case, a fee-simple, and that his wife is dowable, but that it is determinable by the entry of the issue in tail; and the reason is, because when a disseisin is committed, the whole fee is notoriously in the disseisor by his possession, which cannot be abridged and turned into an estate for life without an act of notoriety. For if there could be such transmutation of estates without the solemnities of entry, no man would know in whom the fee resides; so the release leaves the disseisin

[119]

Ld. Raym. 996.
998. 1000.

disseisin *in statu quo*, as to the entry of the heir on him. For this see *Co. Litt. p. 106.* and *108. b. 10 Co. 96. Seymour's case*, revived by *Holt* in the case of — (s). And the same law of a bargain and sale; for that, when it came over from equity to be a conveyance at law, passed only a right, as a release to disseisor would have done before. But a release with warranty works a discontinuance; for at common law, the warranty was a voluntary covenant of the force of a feudal contract, and repelling the warrantor from claiming the land, and obliging him to defend it. And though the statute takes away the force of such covenants, that they shall not bar the issue, yet the issue must claim in the method the statute prescribes, *viz.* by action, and therefore it works a discontinuance, since the issue in such case cannot recontinue but by action only.

Sec. 602, 3, 4,

1d. Raym. 435.

But the warranty must descend on the person's claiming the land; for if he be not heir, he is not bound to defend the lands, after the manner of a feudal lord; and therefore he is not repelled from claiming them.

Sec. 606, 7, 8,
9, 10, 11, 12.

Are all several instances of conveyances, which pass the right, and work no discontinuance (t).

(s) [Of *Machell v. Clarke*, 1 *Lord Raymond*, 778. and see n. (1) to *Co. Litt. 331. a.*]

(t) [See N, XLV.]

If tenant in tail grant "*all his estate (u)*" in fee, and gives livery thereon, this works no discontinuance, because he has an estate for the purpose of alienation but for term of his life. *Sec.* 614, 15, 16, 17, 18. are farther instances of conveyances that pass a right from tenant in tail, and therefore work no discontinuance. [121]

If tenant in tail makes a lease for life (*w*), this works a discontinuance during the estate for life, because he parts with the freehold out of him, and gains a new reversion to the tenant in tail. Now if he grants this new reversion in fee, and tenant for life attorns, and tenant in tail dies during the life of tenant for life, and then tenant for life dies, the issue in tail may enter, because this the discontinuance is at an end, by the death of tenant for life; and the grant of the reversion being secret, must be intended to pass no more than it lawfully might pass, unless it were executed by entry into the possession; for since it operates only as a grant, it must be only intended to pass the reversion during the life of tenant in tail, which he had a lawful power to grant, and not establish a right of propriety distinct from the right of possession. But if a man had thus granted the reversion, and tenant for life had died, and then the grantee had entered by force of the grant, and the tenant in tail had died, this had worked

Sec. 619, 20,
21, 22, 23, 24.

(*) [See N. XLVI.]

(w) [See N. XLVII.]

a dif-

a discontinuance ; for the grantee's entry works a second notoriety, which plainly manifests a discontinuance of the entire fee-simple. But it [122] may be asked, why such grant operates by the subsequent entry, to pass more than it lawfully may pass ; for if the grant and attornment only operate, to pass a rightful estate, why doth the subsequent entry, in pursuance of such grant, make it pass a wrongful one ? The answer is plain ; the grant and attornment of tenant for life pass the new reversion depending upon that estate for life. But since grants in their own nature are secret, and therefore pass no more than they lawfully may pass, it follows that this grant and attornment alone cannot pass the reversion, so as to disinherit the tenant in tail : but if it be executed by entry, then it will ; for the entry is a notoriety, that the grantor intended to perpetuate the discontinuance, and to continue a right of possession distinct from the propriety, and must be equal to a second feoffment, which he might make when tenant for life dies, during his life ; but if he had died before tenant for life, he had not been capable of such feoffment, and consequently of no discontinuance that is tantamount ; for the grant and attornment of tenant for life shew an endeavour to pass the new reversion, and the entry in pursuance thereof must be to all manner of purposes tantamount to a new feoffment, and therefore continues the right of possession distinct

distinct from the propriety, and is by the law construed not to operate as a grant merely, but taking the acts most strongly against the parties, it is interpreted to operate as a feoffment.

If tenant in tail infeoffs him in the immediate reversion or remainder, this operates as a surrender, and therefore passes no more than it lawfully may pass, and consequently works no discontinuance; but if the feoffment were to the more remote reversioner, or to the immediate reversioner with any other, it is a discontinuance, because it cannot be interpreted to operate as a surrender (*).

Are all instances (y) in grants that work no discontinuance, *causa qua supra*, sect. 633, 4, 5. Sect. 627, 3, 9,
630, 1, 2.
If an infant husband aliens the wife's lands, this works no discontinuance, but the wife after the death of her husband may enter; for the infant had no disposing power, and therefore could not part with the right of possession, but so as he might lawfully assume it whenever it appeared to be for his benefit; and if the right of possession was never parted with, after the death of the husband it is in the wife, and she may enter

(*) [See N. XLVIII.]

(y) [Sections 627 and 628, are where an abbot grants a reversion, or other thing which lies not in livery: sect. 629, is a discontinuance: sections 630 and 631, are with livery: and sect. 632, on condition: and, consequently, the sections 629, 630, 631, and 632, should not have been inserted in the margin.]

and defeat such alienation, since it was never absolutely parted with at the time of such alienation.

[124]
Sect. 636.

My Lord *Coke* is of opinion in this case (j*) that by such surrender to the second husband the discontinuance is taken away; for by the surrender the estate for life is drowned, and then there is no alienation in being to work a discontinuance; for the surrender of the estate to the second husband is a giving up the estate, and not an assignment of it over.

Sect. 637, 8, 9.

It is to be known that tenant in tail has the right of possession inheritable, and therefore he may discontinue the same in fee by his feoffment, because since he has an inheritable possession, it follows of consequence, that he may alien it without any disseisin to any person; but if he only makes a lease for life, he executes but part of his power: for since he had a possession inheritable, he from that possession has privilege to alien in fee without disseisin to any one; and therefore after such lease for life he grants the reversion in fee, and tenant for life attorns; and after tenant for life dies, and the grantee of the reversion enters in the life of tenant in tail, this is a discontinuance of the fee; for since he had originally an inheritable possession, this is an execution of the farther remaining part of his power, and amounts to an alienation of the fee

(j*) [See N. XLIX.]

by

by a second feoffment ; for having originally an inheritable possession, he might discontinue the same in fee ; and when he executes but part of his power, the rest remains in him ; and therefore, if he has afterwards opportunity in his life, he may execute it by a second alienation. But if tenant in tail makes a lease for life, and dies, and the issue grants the reversion, and the tenant attorns, and then tenant for life dies, and the grantee enters, and the issue in tail dies, leaving a son ; this is no discontinuance, but that the son may enter ; for the issue in tail had no inheritable possession in him, in as much as the right of the intail only descended on him, and not the possession ; and therefore he could not have any power to alien a right of possession that was never in him ; and consequently his grant, when he never had any original right of possession, by virtue of such entail, doth not discontinue the right of possession (z), so as to bar the son from his entry. So if tenant in tail makes a lease for life, and then grants over the reversion, and the tenant for life attorns, and then the grantee grants over, and the tenant attorns to the second grantee, and dies, and the second grantee enters in the life of tenant in tail, and then the tenant in tail dies, this is no discontinuance to bar the issue, but that he may enter ; [126] because, though the tenant in tail had an origi-

(z) [See N. L.]

nal right to discontinue during his life, because he had the right of possession in him ; yet the first grantee had no right of possession in him, nor ever was seised of the land by virtue of the entail, or otherwise ; and since he never had the right of possession in him, he cannot alien the right of possession, so as to work a discontinuance.

Also 'tis to be noted, that if a man has the right of possession, and is not possessed by virtue of the entail, there he cannot work a discontinuance, unless by warranty ; as if there be grandfather, father, and son, and the grandfather is seised in tail, and the father *disseises* the grandfather, and makes a feoffment in fee, and dies, this works no discontinuance, because the father was not possessed of the entail, but of a fee-simple by disseisin, which was subject to the entry of the tenant in tail, and consequently the alienee is subject to the entry of the issue in tail, in as much as the father, that made the alienation, had only the naked possession by the disseisin, and not the right of possession by virtue of the entail ; but if the father had *enfeoffed* with *warranty*, this had been a bar, because the heirs in that case had been bound by contract to defend *that possession*, and therefore had been ever afterwards repelled from claiming it, if assets descended. But if tenant in tail makes a lease for life, and dies, and the reversion descends to the issue, and the issue *grants the reversion with warranty*,

warranty, and tenant for life attorns and dies, and the grantee enters, and the issue dies leaving a son; this is no discontinuance, but the son may enter; for he is not barred by this warranty; for the issue in this case *only transfers the reversion, and not the possession, or right of possession*; and therefore the issue in this case is not repelled from claiming the possession, which was never transferred to the grantee, and to which the warranty was never annexed; for it were absurd to construe the warranty to extend to the possession of that which never was in possession, at the time when the contract was made.

These are spoken of in the sect. next foregoing. *Sect.* 640, 641, 2. *Sect.* 643, 4, 5, 6, 7, 8. *Vide* in the Comment on *Sect.* 595.

If tenant in tail be disseised, and he releases to the disseisor all his right, this, as is said, puts the estate-tail in abeyance (*a*); because having past away all his right, he cannot have right contrary to his own release. If there be tenant for life, remainder in tail, and the tenant in tail releaseth to the tenant for life all his right, this had put the tail in abeyance; so that he could not afterwards have maintained an action of waste; but if the remainder had been in fee, and he in remainder had released all his right,

Sect. 649, 650.

Ld. Raym. 314.

[128]

Str. 969.

(*a*) [But the entail is not discontinued; and it only remains in abeyance during the life of the ancestor. See *ante*, 117. and *Litt.* at the end of sect. 649.]

the remainder still continues in the tenant in fee, and he may have an action of waste. And the reason of the difference is this, that when the tenant in fee releases all his right, he only confirms the estate to tenant for life, during his life; and for want of words of inheritance (*b*) it passes no farther interest; and therefore he has still a remainder depending on an estate for life, to which an action of waste belongs. But tenant in tail cannot, by the release of all his right, pass an estate during the life of the releasee, but only passes an estate during his own life; and therefore having put all his right out of him, he cannot bring an action relating to such right.

[129]

OF REMITTER.

THE notion of remitter stands on the principles we have already laid down; for either there is a naked possession distinct from the right of possession and propriety, or else there is a right of possession distinct from the right of propriety. Now where there is a naked possession distinct from the right of possession and propriety, as between disseisor and

(*b*) [See *ante*, 72. For the release of the remainderman operates by way of enlargement.]

disseisee,

disseisee, where the entry is congeable (c) ; there if the disseisee takes back the possession from the disseisor he is remitted. For it cannot be otherwise, that when he has taken back the possession, he should be seated in his old right ; for he who has really the title, cannot claim from a disseisor that has no title at all ; and it would be very absurd and unreasonable, that the disseisee by accepting his own possession, should transfer back any right to the disseisor. But where the disseisor transfers it back for life, or years, by deed indented, or by matter of record, there the disseisee is not remitted ; for if a man by deed indented takes a lease of his own lands, it shall bind him to the rent and covenants ; because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. The same law, if it had been by matter of record ; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert. [130]

Ld. Raym. 13.
16, 1511.

Where the right of possession is distinct from the right of propriety (d) ; there, if the proprietary re-obtains the right of possession by agreement, he must hold it under such agreement ; for the other having the right of possession, and transferring it to the proprietary, such proprie-

Señ. 693, 4, 5.

(c) [See N. LI.] (d) [See the preceding note, LI.]

tary must take the right in the same manner as the other has conveyed. For 'tis his own folly and laches, that he would contract about such right of possession, and not assert his propriety in a proper action; but when he has contracted for such right of possession, and such right of possession is transferred, he must keep to the terms of the bargain, and he leaves all the right in the feoffor he has not contracted for; therefore if tenant in tail enfeoff his heir of full age, and dies, he must hold it under the feoffment, because 'tis his own folly that he would take the right of possession in this manner, when he was entitled to the right of propriety after the death of his ancestor.

[131]
 Sect. 664.

But where the proprietary comes to the right of possession, without any fault or folly of his own; as where the right of possession is cast upon him by the law, or he or she comes to the right of possession by feoffment under age, or during coverture, where no folly can be imputed; there such proprietary is remitted and seated in his ancient and former right. For the eldest title being the more ancient, is the least subject to dispute; and therefore when the proprietary has in such manner acquired the right of possession, 'tis esteemed, for the repose of men's inheritances, to be only a restitution of the old title, and not the acquiring a new one; and the rather, because there is none against whom

whom the action may be brought to regain the propriety (e). And when any person has thus acquired the right of possession, if any person will controvert it in any elder action, 'tis fit he should set up an elder title, that the mere right may be decided. Thus if the heir of the disseisor be disseised by the disseisee, he by such wrong and injustice cannot regain the right of possession; for an act of wrong can never gain any right; but if such disseisee die seised (f), then the heir has the right of possession; and having then both the right of possession and of propriety, he is seised in his ancient right for the [132] reasons above-mentioned.

If a man enfeoff an infant or feme covert, Sect. 659. that has right of propriety, for life, for years, or on condition, they are remitted to their ancient right, and all such conditions vanish. For to a feme covert or infant no folly or laches can be imputed, nor can their acts turn to their prejudice; so that when they have acquired the right of possession, they are restored to their ancient right of propriety; and being not capable of contracting, the terms and conditions of the feoffment do not bind them. But if they were of full age, or discover, then they leave all the right of possession in the feoffor, that is not transferred to them by the contract, and must hold the right in the manner transferred to them.

(e) [See N. LII.]

(f) [See N. LIII.]

For since they have no right of possession but from their bargain, 'tis fit that they should hold according to such their contract; but in the other case, 'twas the folly of such parties to transfer the right of possession to such infants as were the proprietors, to hinder them from their actions. And this is the turn of the chapter.

[133]

Of WARRANTY.

Ld. Raym. 35.
ib. 360.

Stra. 414.

WARRANTY, according to *Spelman*, is derived from the *Saxon* word *War*, as the *French* word *Guarranty* is derived from the word *Guer*, of the same signification; which plainly imports an undertaking to defend, and properly by arms, as in a writ of right they anciently defended them. For the warranty was an express undertaking to do the same thing, as the feudal lords used to do to their tenants, and under the same penalties. And so this express contract was to be of the same import, and to amount to a feudal contract; and for this the parties received a recompence (*g*), and that was generally in other lands by way of exchange, which descended to their heirs.

These warranties (*b*) were introduced by the liberties of alienations that happened, according

(*g*) [See N. LIV.]

(*b*) ["These warranties." i. e. express warranties.]

to *Spelman*, about the time of *Hen. 3.* when the *Saxon* liberty of alienation was revived; for then they used to alien to hold of themselves; and then they annexed a warranty, and thereby were called in to dereign the warranty of such feudal lords, in whose homage they were, and did not permit them to alien.

Also such exprefs warranties were used to be given when the lords aliened their seignory (i); for where the old lord was bound by his old feudal contract to warrant, this did not extend to an assignee, without it had appeared to have run in that manner in the old deed, which was often worn out and lost, so that the feudal tenure did totally subsist in prescription; and therefore the tenants would not attorn to destroy the warranty on which their homage ancestor was founded, without a new exprefs warranty from their new lord. [134]

After the Stat. of *Quia emptores*, they used to continue this way of conveyance by warranty, 'till they came up to the old tenants that held by the homage ancestor; so that warranty became frequent in all conveyancing. And they were contracts that had all the import and effect of a feudal contract, which were anciently made between the lord and tenant for their mutual defence. For, *first*, they rebutted such warrantor

(i) [See *Sulliv.* lect. xii. p. 120, 1. and *post.* 139. 154.
(n).]

[135]

and his heirs from claiming any right in the land ; and as in the homage ancestrel the rule was *homagium repellit perquisitum*, so the exprels warranty repelled the ancestor from claiming, and not only him, but the heir, though the right were not in the ancestor. And as in homage ancestrel, where the heir received homage, he could never set up a title to the land itself ; so here in the exprels warranty, the heir was presumed to receive a recompence, and therefore was barred if he did not claim during the life of his ancestor ; and this was the more reasonable, because such recompences were anciently in lands, which did of right descend to the heir ; and if the ancestor did alien them, the heir must claim his own during the life of the ancestor ; otherwise he could never claim it, in as much as this was the whole time of limitation for the heir to challenge his own in this case (*k*). And if he slip'd that time, he was barred for ever, in as much as there might be secret conveyances to alien the recompence for the benefit of the heir, which might turn to the prejudice of the purchaser.

But though the warranty barred the right of entry or right of action in the heir, yet it did not bar a title of entry for a condition broken, mortmain, forfeiture, escheat, or the like. For the feudal contract only barred all the right to

(*k*) [See N. LV.]

the lands themselves, in the lords themselves, as is said in the homage accestrel; but it did not bar his title of entry for condition broken, forfeitures, escheats of such tenants, or the like. [136]

And the exprefs warranty could go no farther than the warranty implied in the feudal contract, since it came in the place of it. If the warranty attaches in the heir that has right, during the continuance of the estate warranted, he is for ever barred to claim it, not only against the warrantee himself, his heirs and assigns, but against a disseisor, abator and intruder, recoveror, *cestuy que use*, lord of the villain, lord by escheat, or any other person coming-in in the *Post*; because the heir is presumed to have received a recompence, and therefore cannot have the land itself, no more than when he has received homage from an heir that holds by homage ancestrel, can he claim the land itself. But if the warrantee's estate be recovered by elder title, then the heir may recover against such recoveror, though the warranty were attached in such heir; an example of which see *sect.* 741. because the recompence descended to the heir stands precarious from the time that the recovery was had; for the warrantee, if he pursued his writ of *warrantia chartæ*, might recover the lands descended to the heir, and therefore the heir is at liberty to pursue his action against the recoveror. But if the estate of the warrantee be defeated by any person that comes-in in the [137]

7 *Post*,

Post, before such warranty attaches in the heir, there the heir may enter upon such person in the *Post*; as if the lord by escheat, or the lord of the villain enters before the descent of the warranty, there the heir may enter on such lords; for when the estate warranted is taken away, before the recompence descends on the heir, the heir has title, because when the estate warranted is destroyed, the ancestor is not obliged to continue the recompence to descend to the heir, but he may alien it; therefore it is not necessary to be presumed, that any recompence descends to his heir, or consequently that the heir should be barred in this case, no more than a lord is barred from entering on a disseisor, of his tenant before he has accepted the homage from him, which is the recompence for the land itself. But if the same estate continue, to which the warranty was annexed, though in other *lands* [*bands*], yet the heir is barred; as if a man makes a warranty to *A.* and his heirs, and he aliens to *B.* and then the warrantor dies, the heir is barred from entering on *B.* because the same estate continues, though in other *bands*, to which the warranty was first annexed; and therefore it is presumed in justice that the warrantor left a recompence to descend to the heir; for *B.* may have a warranty, and vouch *A.* who may vouch the warrantor and his heirs to recompence. So *cessuy que use* seems to continue the estate of the feoffees, and the warranty transferred by the statute, and therefore

fore a recompence is presumed to descend to the heir to answer it.

The second operation of the warranty was by way of voucher ; for, as in the feudal contract the tenant vouched the feudal lord to defend his possession ; so in the express warranty, the purchaser vouched his warrantor, who took the defence of the estate upon him ; and as no man could vouch the lord but the tenant, so no man could vouch the warrantor but he that brought himself within the words of the contract, because there was no contract to defend the possession to any body else. But as the lord, by acceptance of homage from the disseisor, was barred from claiming the lands ; so the warrantor, having received a recompence, was rebutted from reclaiming the land itself.

The third is by writ *warrantia chartæ*, which also could only be brought by the party to such contract ; for the tenant by homage ancestorl might have had his *warrantia chartæ* against his lord, to subject the lands of his lord to answer the feudal contract. And when the assize was invented, in which a man could not vouch ; and when also by *West. 1. c. 40.* a man could not vouch out of the degrees, unless in both cases the party was present ; *vide Booth 278* ; then this writ came more into use ; and upon such actions, where they could not vouch and have process *ad warrantizandum*, they requested a plea, and the same was done in the case of express [139]

press warranty. But it is to be noted, that in case the warrantee is impleaded, he must request a plea; and when he has so done, he may bring his *warrantia chartæ*, and recover at any time till execution actually executed. But if he be turned out of possession, then he can have no *warrantia chartæ*; for the warranty in the feudal contract is to the tenant, and in resemblance thereof, the express warranty is only to the tenant of the land. *Hale's Fitz.* 135. (l)

[140] The words that create a warranty were first anciently the reservation of homage (m), for the reasons given in homage ancestrel, as plainly appears by the statute of *Bigamis* (n). *Vide* 275, 276 (o). Secondly, the word *Dedi* (p), to hold of the donor and his heirs; for when such tenure was erected by the said words, it was supposed that the services reserved were a perpetual recompence for such tenure, and therefore such warranty was perpetual. Thirdly, *Dedi*, to hold of the lord of the fee, was settled by the statute of *Bigamis*, c. 6. to contain a warranty, during the life of such donor; because the lord might avow upon his old tenant that was already in his homage, during life; and therefore against the

(l) [*F. N. B.* 135. B. n. (e).]

(m) [See *ante*, 133. N. LIV.] (n) [4 *Ed. I.* §. 3. c. 6.]

(o) [*Booth on Real Actions*, 275, 276.]

(p) [Of the operation of the word *dedi*, as to warranty, see 4 *Co.* 81. a. *Co. Litt.* 384. a. and *Butl. n.* (1). 2 *Bl. Comm.* c. 20. p. 300.]

tortious entries and distresses of the lord, it was necessary that he should be protected; and it was also thought then a point of honour that no man should see his own gifts invalidated without entering into the defence of them; and anciently perhaps being taken into the lord's homage created warranty. Fourthly, by the word *warrantizo* (*q*), which contains as express a warranty, as if there had been an homage reserved to the warrantor, *sect.* 733. Warranties (*r*) at common law are of two sorts; first, those commencing by disseisin or wrong; and secondly, binding warranties. The first are where the ancestor that makes the warranty is partner to the wrong, and such warranties are not obliging; because it cannot be presumed that one who is so unjust as to do wrong, will be so just as to leave a recompence to his heir; wherefore such contracts are wholly rejected as collusive, and founded on no consideration. All other warranties were binding at common law; for a recompence was presumed to be given, which was then either in land, by way of exchange, or in money, which was turned into land, and descended to the heir; and therefore the time of limitation for the heir to claim was during the life of the ancestor (*✓*); otherwise the state of the purchaser, which subsisted on the warranty

Ld. Raym.
360.

[141]

Sec. 698, 9.
700, 1, 2.

(*q*) [See N. LVI.] (*r*) [This should begin a new line.]

(*✓*) [See *ante*, 135. N. LV.]

of the ancestor, should never be defeated by such heir that ought to defend it; and if such warranties were not binding, there might have been many secret conveyances for the benefit of the heir, to defraud the purchaser. And in that age, when the building up of families, and establishing them in seats and tenures was the whole business of the times, they presumed that no man would destroy his heir's right for his own present advantage (*t*). As to these binding warranties, there are some altered by the statute: The first statute is that of *Glocest. c. 3.* which says, that tenant by the curtesy shall not, by his deed with warranty, bar the heir of the land descended to the mother, further than assets descend from such father; for the estate being created by the law only for life, it was fit to prevent such father from grasping the fee. If assets descend from the father, by the express meaning of the act, the purchaser shall retain so much of the land of the mother. But if lands afterwards descend, such purchaser must plead the warranty, and may have a *scire facias* for so much of the same land, as assets shall afterwards descend, in lieu thereof.

[142]

The next statute was that of *Westm. 2. De donis*, which took from tenant in tail the power of alienation. Now this first formed the distinction between the lineal warranty and colla-

(*t*) [See N. LVII.]

teral (*u*); for before that statute all warranties were binding to the heirs at law, as well where a man had title to the lands, as where he had not; for after such warranty and acquiescence, a recompence was presumed to descend, instead of the land itself.

But the statute *De donis* only barred the alienation of tenant in tail; therefore the lineal warranty was within the statute, but the collateral warranty was left as it was by the common law (*w*); but the difficulty is to observe how the distinction arose between the lineal and collateral warranty; and for this we must go back to the considerations already mentioned, touching the alienations. First, Originally the person aliening consulted his lord, and a fine for alienation was paid, and the alienee was received into the homage, and consequently into the warranty of the lord of the fee. Secondly, Towards the latter end of the barons' wars, tenants began to alien to hold of themselves, to save the fine, and then they made express warranties in such conveyances, to bring the feoffor into the defence of the land, who brought in the lord of the fee; and this was confirmed by *Magna Charta*, so there was enough to answer the lord's distresses;

[143]

(*u*) [See N. LVIII.]

(*w*) [See of the operation of warranty with respect to the barring of estates-tail, 2 *Bl. Comm. c. 7. p. 116. c. 20. p. 303. Butl. n. (2.) to Co Litt. 373. b.*]

OF WARRANTY.

but sometimes they then aliened to hold of the chief lord, and then the lord might have taken the feoffor that was in his homage, for his tenant during life (x); but afterwards could not avow upon his heir that never was in his homage at all; and therefore was obliged to take the alienee after the death of the alienor. But, before they were taken into such lord's homage and warranty, they used to agree for the fine; and therefore in such cases the warranty by *Dedi* was during the life of the warrantor. Thirdly, To quiet disseisins, that were usually very frequent in those unsettled times, between neighbouring feudaries (and from thence (y) called deadly feuds) it was usual for such disseisors to purchase warranties (z) from some ancestor of the family; and this gave a right to such disseisor; for it might be easier to compound with the ancestor, than with the party to whom the wrong was actually done; and then to quiet men's possessions such warranty bound, if the owner acquiesced under his expectations from such relations. Fourthly, The next step was, on the statute of *Quia emptores*, when they aliened to hold of the chief lord, and the lord being then compellable to receive such persons into his homage, was not obliged to warranty. Upon the first three points the law had stood at the making the statute *De donis*, which was only a gene-

[144]

(x) [See N. LIX.] (y) [See N. LX.] (z) [See ante, 53.]
ral

ral appointment that the will of the donor should be observed ; so that the tenant in tail should not alien to the disinherittance of the issue, and of him in reversion. But it was left to the king's courts to mould such estates, and to make rules and orders to prevent such alienations, and none were more necessary than to restrain these warranties. The first order or rule that was taken in this case was, that the warranty of tenant in tail, or of any person in title under the tail, should be no bar, unless assets descended (a). This was made according to the platform of the statute of *Glocester* ; for they thought it was equal to make the same rule as to tenant in tail, as they had made in parliament for tenant by the curtesy, viz. That the warranty should be no bar, unless the warrantor left an equivalent estate to descend ; but if no assets descended in the case of tenant in tail, they might have a *scire facias* for the assets, and not for the land intailed. But in the case of tenant by the curtesy the *scire facias* was for the land, on the part of the mother, which was the very land aliened, and not for the assets descended ; and the reason of the difference was, because if the *scire facias* had been for the land intailed, then if the assets had been aliened, the issue in the next descent might have come again with his formedon, 1 *Inst.* 366. and not only tenant in tail himself,

[145]

(a) [See *ante*, 142. (w).]

but all other persons lineal in that title were debarred from making such warranties; for the estate-tail was designed by the act to continue to all generations; and if they had permitted the next heir though he was not in possession of the tail, to have barred it by his warranty, then might the father and son by their warranty have barred the tail, and destroyed the perpetuity the statute designed. The second order was, that the collateral warranty was not (*b*) within the statute; for the statute only appointed that the will of the donor should be observed, that the tenant in tail should not alien to disinheret his issue, which they extended to all lineals, for the reason aforesaid; for otherwise the will of the donor could not be observed. But they could not in any manner of reason extend it to collaterals that were not to take by the gift, and therefore could not be forbidden to bar by their warranty. Again, it would be very hard to appease the feuds and disseisins touching estates-tail, if the ancestor could not bar it by collateral warranty, which of old commonly ended such contentions. Nor could there be any exchanges by any ancestors of the family, in order to better the estates of the issue, if such collateral warranty were not a bar. And they did not in this case oblige the tenant to shew assets; for

[146]
 Ld. Raymond,
 360.

(*b*) [See *ante*, 142. (*w*).]

assets were presumed, as it was before, if the whole matter was transacted during the life of tenant in tail; and he did not enter to disannul it; therefore according to the text, *sect.* 708. if the tenant in tail discontinue the tail, and die, leaving three sons, and the middle son releases with warranty (c) to the discontinuée, this is a collateral warranty to the eldest son, and lineal to the youngest, *causa qua supra*.

If land be given to a man, and the heirs [147] male of his body, and for default of such issue, to the heirs female, and he hath issue a son and a daughter, the son may bar the daughter by his warranty, *sect.* 719. because the son is not lineal in the tail, *quoad* the females (d). And the rule of the court only extends to lineals barring their subsequent heirs; and they made no rule in relation to collaterals, but they were left as they were at common law; for they thought that the alienations were sufficiently prevented, if all persons that came in of the same tail were prohibited from barring their issues, or joining in any warranty to defeat such tail; but as to those that were not seised by force of that entail, there was no reason to nullify their warranties to maintain the will of the donor, since they had no interest in such gifts, and therefore were not obliged by the words thereof to maintain it; and therefore the son, that had no interest

(c) [See N. LXI.]

(d) [See N. LXII.]

in the intails *quoad* the females, might bar it by his warranty.

[148] Now in the homage ancestrel the lord was obliged to defend his tenant, and find him a champion, if he were impleaded; for if it had not been so ordained, all those tenures would have been precarious, because the tenant having no feudaries, could not himself have defended it. So in the express warranty, in respect of the recompence given, the warrantor and his heirs are obliged to defend the land, and to find a champion where the trial was by battail.

It is also to be noted, that if an infant be disseised, and the ancestor of the infant releases to such disseisor with warranty, and dies during the nonage of the infant, this is no bar; but if such ancestor releases during the nonage, and after the infant comes of full age, and then such warranty descends, then is the infant barred; because where the infant has the right of possession, no laches can be imputed to him, nor is he a competent judge of what is a sufficient recompence; and therefore his acquiescence cannot be construed to his prejudice; and therefore he ought not to be barred, if he doth not enter during his minority (*c*). But if only a right of action descend to the infant, then he is barred by the collateral warranty of his ancestor, though it descends during his infancy, because

(*c*) [See N. LXIII.]

then the infant has only a right of propriety; and such rights are recovered in real droitual actions, where battail is joined, and then the parol must demur till the infant comes of full age, because the infant cannot fight himself, as the method was anciently among those barbarous nations. Nor can he appoint a champion during his nonage; and when he comes of full age, he must be barred, because he ought to defend the lands to the tenant, and to procure him a champion; and therefore to such rights of propriety the warranty is a bar, though it descend during his infancy. *Seet. 726. Co. Litt. 380.* If an ancestor devise lands deviseable with warranty, as in *seet. 734.* such warranty doth not bind, because the estate begins after the death of the ancestor, and consequently there can be no laches in the heir, since the warranty did not commence till after the decease of the ancestor; and therefore there is nothing to be presumed from such acquiescence.

Secondly, There can be no recompence given by the ancestor, since the estate begins after his decease. Thirdly, There are no parties to such contract; for the ancestor is not in being at the time when such contract has force, and the heir is not party thereunto (*f*). But if a man warrants the land in fee, and takes back an estate for life, as in *seet. 744.* this doth not destroy

(*f*) [See N. LXIV.]

[153]

and without such acknowledgment to the lord; then it seems the lord, if he hath right, may enter, and is not repelled by his own homage from asserting such right; but though the lord's accepting homage from the disseisor barred him from any right to the land, yet it did not bar his title of entry for a condition broken or forfeiture, or on the escheat of such disseisor; for he took it under the same feudal conditions as the disseisee had it, of which see more in title *Warranty* (i), and title *Releases* (k), that enure by way of extinguishment. Secondly, As the feudal contract repelled the lord from claiming; so in case any stranger claimed, the lord was vouched; and if he did not defend the tenant, he recovered in recompence against him; and this was, that the tenant in the lord's homage might have a quiet possession, and the lord might not abet any third person to overthrow his title, and therefore the champions of the manor were brought in to defend the title of the tenant in question. Thirdly, By writ of *warrantia chartæ*, and this the tenant by homage ancestrel had, as well as the person that had an express warrantry. *Fitz. Nat. Brev.* 134. for the feudal charter was the foundation of such writ, and therefore the writ runs *unde chartam habet* at this day; and upon such writ he may give the homage ancestrel in evidence; for the prescription supplies the place of a char-

(i) [See ante, 135.]

(k) [See ante, 63.]

ter lost and worn out by age. And *note*, that in these actions of *warrantia chartæ*, and by voucher, he shall recover in recompence any land that the lord had; but otherwise it is [of] an expresse warranty; for there he shall only recover the land descended; and the reason of the difference is, because when the old feudal contracts grew to be immemorial, they could not distinguish which lands descended from the ancestor that made the grant; and therefore all lands were liable to such feudal contract, lest the tenant should be ousted of his defence. This sort of tenure has been totally destroyed (l) by the free liberty of alienation; for before the statute of *Quia emptores*, the lord used to license an alienation, and they then seemed to succeed into the same homage, and to have had the same defence from the lord; but when the statute of ——— (m) came that gave tenants a free power of alienation, the tenant used to alien with expresse warranty, and so they used to deraign the lord's warranty; and when the lord aliened, they used to have an expresse warranty from their new lord (n); otherwise they would not attorn; and if they did, it was reputed their own folly.

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(l) [See *Co. Litt.* 100. b. n. (1) to 67. b. n. (1) to 105. a. 2 *Inst.* 11. *Sullivan*, Lect. xii. *Cowell's Interp.* tit. *Homage Ancestrel.*]

(m) [Of *Quia Empt. Terr.* 18 Ed. I. f. 1. c. 1.]

(n) [See *ante*, 134. (i)]

OF

CUSTOMARY and (a) COPYHOLD

T E N U R E S.

Co. 21. 2.
1 Str. 452.

(b) **T**HOUGH a copyholder has but an estate at will, yet it is in this different from other estates at will; that it doth not determine upon the copyholder's death, but descends to his heir,

(a) Tenants by the verge, are but copyholders; and have no other evidence but by copy of court roll. But they are so called, because when they surrender, they deliver a little rod into the steward's hand, who shall deliver the same rod to him that takes the land in the name of seisin. It may be any other thing as well as a rod, according to the custom, as a single penny, a glove, &c.

Copytenants, copyholders, or tenants *per copy*—*d'ancien temps fuer' appellez tenants en villenage—et ceo appiert per les aunciennes tenures*, &c. F. N. B. 12. C. Bro. tit. Villenage 63.

Tenants at will, by copy of court roll, being in truth *bondmen* at the beginning, but having obtained freedom of their persons, and gained a custom by use of occupying their lands, they are now called copyholders, and are so privileged that the lord cannot put them out, and all through custom. *Bacon's Use of the Law*, 43. [See N. LXVI.]

(b) The copyholder may justify against his lord, but so cannot a tenant at will; and he shall have the aid of his lord in an action of trespass. 1 *Leo*. 4.

if it be any estate of inheritance. The reason of this seems to be, because upon copyhold estates villain tenures were usually reserved, and these estates were given to villains (*c*); therefore no other estates could be granted to them but at will; for otherwise they had been enfranchised, as it seems. But to prevent the frequent ending of these estates, they granted them in fee, but yet at the will of the lord; and according to my lord *Coke*, notwithstanding such grant, they were entirely at the will of the lord, who ousted them when he pleased, without any reason (*d*); which being a very great inconvenience, it seems it was altered by some positive law (*e*) (though that does not appear) which preserved their estates to them, doing their services, but yet left them as it found them, to have estates only at (*f*) will (*g*).

Ld. Raymond,
44.
F. N. B. 12. C.

A copyholder cannot transfer his estate but by surrender (*b*); the reason is (*i*), because he has only an estate at will (*k*), which is deter-

[157]
4 Co. 21. a.

(*c*) [See N. LXVII.] (*d*) [See *Co. Copyb.* f. 8, 9.]

(*e*) [See *post.* 161. It seems rather to have been "by little and little," as Lord *Coke* says. *Copyb.* f. 32. *Traitts*, 56, 7.]

(*f*) [See N. LXVIII.]

(*g*) Copyhold lands are parcel of the manor itself, and not held of the manor. 1 *Ld. Raym.* 44.

(*b*) [See N. LXIX.]

(*i*) And another reason of a surrender is, that the lord should not be a stranger to his tenant.

(*k*) If a surrender be defective, a court of equity will relieve. *Mich.* 10 *Geo.* 1725. *Ch. Rep.* 75. *Ch. Cases* 254. 1 *Vern.* 69. [See N. LXX.]

mined

2 Inst. 57. 2.

2 Inst. 60. b.

[158]
4 Co. 21. b.

mined when he takes upon him to grant it over (*l*); for that is a plain declaration of his intent (*m*), that he designs to hold the land no longer; so that he must surrender to the lord, and then he may grant another estate at will, which now the lord is compellable to do to him to whose use the surrender is made (*n*). Because the copyholder now has that settled interest and estate in the land, that his heirs shall inherit the land, whether the lord be willing or not; and so a copyholder hath power over his estate, and not the lord; therefore 21 *Ed.* 4. *Brian* said, that if the lord enter upon his copyholder, he might have trespass (*o*). So far is it now from being a determination of copyholder's estate.

A copyholder in fee may surrender, reserving rent, with a condition of re-entry for non-payment, and he may re-enter for non-payment; for having a fee-simple according to the custom of the manor, he may reserve what profits he pleases out of it, by the same reason as

(*l*) The lord is not compellable to make a surrender. *Moor* 1088. *Lord Grey's case*. [See N. LXXI.]

(*m*) In what cases copyhold estates may be transferred without surrender. *Hutley* 150. *Winch.* 3.

Copyhold estates are within all the statutes of Bankrupt. *Cro. Car.* 550. 569. 1 *Keb.* 24. [See the preceding Note LXXI.]

(*n*) [See N. LXXII.]

(*o*) [See *Co. Litt.* 60. b. *Bro. Ten. p. Copie.* pl. 13. and *vide* pl. 10. *Co. Copyh.* f. 9. and see *post.* 328, 9. where our author says that if the lord forceably enter on his copyholder, it seems he may be indicted for it.]

he

he may dispose of it as he pleases. And since by custom an estate at will is descendable, the descent is ordered and governed by the rules of the common law (*p*). For those reasons that govern the descents at common law, are drawn from the nature of descent and disposition of estates after the owner's death; and are grounded upon those reasons that seem to warrant such a disposition of the estate, and are not taken from the nature of the land or thing that is disposed of, and therefore may as well, and with as good reason, be applied to the disposition of copyhold as freehold estates; since it is not the nature of the thing disposed of, that is to rule or govern either in one case or in the other. And therefore, where a copyholder by licence (*q*) made a lease for years, and the lessee entered, and the lessor died, having issue a son and a daughter by one venter, and a son by another, then the eldest son dies: adjudged, that the daughter of the whole blood shall inherit; because the possession of the lessee for years was the possession of the elder brother, who may have possession

Crook Eliz. 361.
Ld. Raymond,
630.
Ib. 1345.

4 Co. 23, 3.
The like case of
a guardian.
Dier 292. 2.
Cro. Car. 417.

[159]

4 Rep. 21.

(*p*) [See N. LXXIII.]

(*q*) [It is said in some of the books, that the lease should be made by *surrender*. 3 *Leon.* 69. *Ca.* 106. 4 *Leon.* 38. *Ca.* 103 and 212. *Ca.* 334. *Co. Litt.* 15. *a. n.* (2). But from *Moore*, 125. *Ca.* 272. and *Co. Copyh.* f. 41. *Traitts*, 95. it should seem that a licence is sufficient to give this effect to a lease.]

N

before

before admittance (*r*); for in that case he was not admitted; for if it be reasonable in such case at common law to keep the inheritance out of the half blood, so it is in copyhold estates. But if the brother do not get possession, the sister cannot inherit; for then he hath only a right to the lands as representative of his father, which right she is not capable of having, because she is not representative of the father. But when he has gotten possession, he hath then an estate in the lands descendable to him and his heirs, and the sister is his heir; and though he has the lands as representative of his father, yet he hath them to him and his own representatives. But when he never got possession, he never executed the power he had of taking the lands to him and his representative; so that this power devolves upon the younger son as representative of his father; for the law gives the estate to him and his representative, who is representative of the dead person. Now when he that is representative to the dead person, doth not get actual possession, and so vest the estate in him and his heirs, he hath no power over the lands, and therefore can make

[160] no lease or disposition of them by feoffment; because though he hath a right to be absolute owner of the lands, yet is he not actually so till entry, because till then in fact he hath no pos-

(*r*) [See *Watk. on Desc.* c. 1. §. 2. p. 51, 2.]

session;

feffion; and therefore there is no reason by a fiction of law to create him a possession. And so he never having had the lands to him and his representative, he must take that is representative to the dead person, which is the younger brother; and this also may be a reason why he that claims by descent, must make himself heir to him that was last actually seised of the freehold. But though copyhold land be governed by the rules of the common law, concerning descents, yet it partakes not of the nature of freehold land in other respects (s). For it is not affets in the heirs hands, neither shall a woman be endowed, or husband tenant *per curtesy*, unless by special custom; (t) neither shall a ^{4 Co. 23. a 30. b.} descent toll an entry. The reason seems to be, because the estates of copyholders were at first only estates at will, and at the absolute disposition of the lord; and there hath not since been [161] any provision made for those particular cases. For my lord *Coke* says, that copyholders have ^{4 Co. 22. a} only a fee-simple *secundum quid*; that though they are tenants at will, yet their estates shall descend to their heirs, and not be determined by their death; and not be subject to the will of

(s) Nor are they within the statute of *Westminster* the 2. c. 18. which gives *elegits*. *Savil's Rep.* p. . *Heyden's case*. [See *post*. 185.]

(t) Nor are they forfeited by outlawry. *Lit. Rep.* 234. [See *post*. 242.]

the lord, as other estates at will are (which it seems was introduced in favour of them by some positive law (*u*), though no footsteps of it appear now); but not *simpliciter* to have all the collateral qualities of estates in fee-simple at common law, in which respects that positive law seems to have left them at large as before.

Co. Cop. 114.

My lord *Coke* says in his Copyholder, that if the lease for years determine, and the elder brother die before entry, that the younger brother shall inherit; for when he has once got possession, which he had by the possession of his lessee for years, then it seems he has made the estate descendable to him and his heirs. But perhaps it will be said, that the possession of the lessee for years is only the possession in law of the brother, and not in fact, because he can get no possession; and it would be inconvenient to carry the estate to another family, if the elder brother die before entry; but when this estate for years is ended, then since he may get a possession by entry, it is acquired by law. But then on the other hand, if by the possession of the lessee for years, he had an estate descendable to him and his heirs, how comes this estate to be divested by the expiration of the lease for years? It is urged on the other hand, that possession was but feigned, and

(*u*) [See *ante*, 156. (*e*)]

is now gone (*w*); but yet if the brother were once in possession, and then were disseised, it seems the sister should inherit, though the possession of the elder brother were gone. But the possession of the lessee was the brother's possession only by supposition of law, to help him out where he could get no possession; and therefore when that estate for years is gone, the law removes the assistance it gave before, because now he may get possession, and so sets the matter between the brothers as it would if there had been no lease for years. *Ideo quære de hoc* (*x*).

Dyer 291.
Moor 371.

(*y*) The heir before admittance (*z*) may enter and take the profits; for perhaps there may [163] not be a court holden in a great while afterwards. Such heir may surrender to the use of another before admittance (*a*), but not to prejudice the lord of his fine. *Quære*, Whether the lord in such case must admit before the heir has paid his fine, and if he do, what remedy there is for the fine (*b*).

4 Co. 22. b. 23.

1 Leo. 174.

(*w*) 2 Levinz 107. *Blackborn v. Greaves*. *Sed quære*
4 Leo. Case 226. 1 Ventris 260. 1 Mod. 102. 120.

(*x*) [See N. LXXIV.] (*y*) *Moor* 596. 2 Cr. 105.

(*z*) [See *ante*, 159. So he may bring trespass or ejectment, make leases, &c. before admission. See *Com. Dig. Copyh.* (D. 2.) *Viner*, *Copyh.* (D. b.) *Watk. on Desc.* c. 1. f. 2. p. 51. and notes. *Co. Copyh.* f. 41.]

(*a*) [See N. LXXV.] (*b*) [See N. LXXVI.]

4 Co. 22, 23.
Mod. Rep. 120.
3 Co. 7.

The admittance of tenant for life is the admittance of him in remainder (*c*), because they make but one estate; but the lord shall have a fine for the remainder-man's interest, but the remainder-man need not pay it till after the death of tenant for life, for then he becomes tenant to the lord (*d*). *Micb. 8 W. 3. in B. R. per Holt.* The admittance of tenant for life is the admittance of him in remainder (*c*), so as to vest the estate, but not to prejudice the lord of his fine (*d*); for after the death of tenant for life, he in remainder shall be admitted again. *Quære.*

1 Leo. 4.
Mo. 128.

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'Tis enacted by the 31 *H. 8. c. 13.* That if any abbot, &c. shall make any lease of lands, &c. in the which any estate for life then was in being, then every such lease to be void. A copyhold was let for life by copy, and then the religious house granted a lease of it to another for ninety years; and it came to be a question, Whether this was a void lease? And the doubt was, Whether a copyhold estate for life were within the words of the act, in which (any estate or interest for life, &c.); and it was resolved, that the lease was void, and that the copyholder had an

(*c*) [See *Watk. on Desc. c. 1. s. 1. p. 21. n. (w)*; *s. 2. p. 50. n. and post. 194.*

So the remainder-man or his heir may surrender, on the admittance of the particular tenant, though they never were admitted expressly themselves. *Cro. Jac. 36. pl. 10. Cro. Eliz. 504, 662. 4 Leon. 9. pl. 38. and 111. pl. 126.*

(*d*) [See *N. LXXVII.*]

estate

estate or interest for life. And in the handling this case, some general rules were laid down for the exposition of statutes, where they should extend to copyhold estates, and where not (*e*). When a statute alters any interest, tenure, custom, service of the manor, or doth any thing in prejudice, either to the lord or tenant, there the general words of an act of parliament will not extend to copyholds; but when an act is generally made for the good of the common weal, and no prejudice accrues to the lord, &c. there copyholders are often bound. And this reason, as it seems, was the ground the judges went upon in the resolution before; for there was an act of parliament made for the king's advantage, to prevent the alienation of those lands that were to come into the hands of the king; and it was no prejudice to the lord to hinder granting future estates, so long as it permitted the granting present interests (*f*). And in this case was something touched concerning the great controversy of entailing copyhold lands (*g*). And 'twas held *per tot. curiam*, that generally copyhold

1 Ld. Raym.
132.

3 Co. 7.
Cro. Car. 42, 3.

Stra. 253, 258.

Stra. 516.
Ld. Raym.
1066.

[165]

(*e*) [See N. LXVIII.]

(*f*) About the latter end of the reign of queen *Elizabeth*, the question was debated, Whether copyhold lands could be entailed? *Vide Cr. Eliz.* 308, 907. *Moor* 753. *Godbolt* 358, 367. *Cr. Car.* 131, 411. 2 *Roll. Rep.* 383. *Wm. Jones* 360.

And in *Hill* and *Morse's* case it was adjudged, that where a copyhold is entailed, it must be by a special custom so to do. *Moor* 188. 637. 1 *Lev.* 136. *Raymond* 164. *Sid.* 314.

(*g*) [See N. LXXIX.]

3 Co. 8.

Cro. Car. 45.

Cro. Car. 43.

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Cro. El. 717,
907.
3 Co. 8.
Moor 358.
Litt. sect. 13.

lands could not be entailed; because if the statute of *Westm. 2.* brings in a new estate, as an estate-tail is, then it must introduce a new tenure, *viz.* the donee to hold of the donor, which comes within the rule before of a general act, not binding copyholders in such a case. Another reason was, because the words of the statute *de donis* are *quod voluntas donatoris, &c.* so that what may be entailed within that act of parliament, must be given by charter in tail; and copyholds are not given by charter in tail, but by surrender and admittance. That a surrender and admittance is no alienation by deed, see *Litt. sect. 74.* For 'tis there said, an alienation by deed is a forfeiture. Again, that copyholds cannot be entailed, was also resolved, in the case of *Rowden* against *Malfster*. In both these cases 'twas objected against entailing copyhold lands, that it would introduce a perpetuity, because no fine or recovery could be suffered of them; and so the owner cannot dispose of them. Thus far then went the resolution of the courts in both cases; that copyholds are not generally within the statute *De donis*. But then when 'twas objected by some, that where there hath been a custom for entailing copyhold estates, there the statute *De donis* co-operating with the custom, should extend to it. But the lord chief baron answered that 'twas all one, and that no custom could make the statute extend to copyholds; because all the estates at common law were fee-simple, as *Litt.* says; and so

so there could be no custom to entail copyhold lands before the statute; and since there could not be; because no estate in copyhold is grantable, but what hath been grantable time out of mind; and the statute *De donis* is within the time of man's memory. But this was not the resolution of the court, but only my lord chief baron's opinion. In the case of *Rowden ver. Malster*, a copyhold was surrendered to the use of the copyholder's will, who devised it to J. in tail, remainder to H. in tail, &c. J. hath issue, and surrenders to the use of his wife for life; 'twas adjudged, that since the jury found 'twas not the custom of the manor to have an estate-tail in a copyhold, that J. had a fee-simple conditional; and that by his having of issue, he had performed the condition, and the surrender to the use of his wife was good.

Cro. Car. 44. 5.

[167]

One argument against copyholds being entailed was, that no fine could be levied, or recovery suffered, because a warranty cannot be annexed to an estate at will. There's a case cited in *Podger's* case, where 'tis said to be adjudged, that copyholds are not within the statute *De donis*; but it doth not say, if they be entailed by custom, they are not within the statute.

Cro. El. 391.
9 Co. 105. a.

There is the case of *Eriſh ver. Rives*, where 'twas adjudged, that without a custom copyholds can't be entailed by the statute *De donis*. These are all the cases that I can find against entailing copyhold lands, none of which go so far as to say, that if there have been an estate-tail by cus-

Cro. El. 717.

tom,

[168]

Litt. Sect. 73.

* Inst. 60.

tom, that 'tis not within the statute *De donis*, but only the opinion of my lord chief baron, which will be but of little weight when we have seen the precedents against this opinion, which I shall now examine. And first, There is *Littleton's* opinion for the entailing of a copyhold; for he says, that tenant by copy of court-roll is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind; That certain tenants within the same manor have used to have lands and tenements, to have and to hold to them and their heirs, in fee-simple or fee-tail; so that there he says expressly, that estates-tail in copyholds have been time out of mind, and therefore must have been before the statute. But my lord *Coke* in his comment on *Littleton*, in another place says, that an estate-tail may be, by the opinion of *Littleton*, by the custom, the statute co-operating with it; for saith he, there can be no estate-tail in copyholds by custom only, nor no estate-tail by the statute only, but the statute must co-operate with the custom. Now the question will be, How this can be reconciled with what *Littleton* says? For he says, That an estate-tail in copyholds was time out of mind of man; and then if estates-tail were before the statute, the question is out of doors, whether a copyhold can be entailed by force of the statute; for if they were entailed at the common law, then as to them the statute is but in affirmance of the common law.

It

It seems the meaning is this, that estates-tail Cart. 22. were before the statute, as to the manner of limitation by the custom of some manors ; as that an estate was granted to a man and the heirs of his body begotten, the remainder over to another ; but that in other respects these estates were not estates-tail before the statute, as that the tenant should no ways alien to debar his issue, or them in remainder ; or that if he made any discontinuance, they should have a form-don in descender or remainder ; but these things were introduced by statute upon the estate, which was the same in limitation by the common law ; and so the statute is said to co-operate to make an estate-tail ; and this obviates the main objection against intailing copyholds by the statute, *viz.* That every copyhold estate ought to be grantable time out of mind ; and if an estate-tail were introduced by the statute, then that estate was not grantable time out of mind ; for if the estate-tail were, before the statute, the same in point of limitation of the estate, as it is now since the statute, then an estate-tail hath always been grantable time out of mind, though some other qualities are now annexed to that estate by act of parliament, which were not so before, and which may well be said to give the statute some share in the making those estates, since they are so very considerable. And that the qualities should be annexed to this estate by the statute *De donis*, is no ways

ways unreasonable; for this act was made to redress a wrong at common law, and was for the general convenience and profit of the weal publick; and the bringing an estate-tail in copyhold lands within the statute *De donis*, is no prejudice to the lord or tenant, alters no tenure, estate or custom of the manor, which may any ways prejudice any body.

[Co. Litt. 60.
6.]

It is no proof of a custom time out of mind to intail a copyhold, that an estate hath been granted to a man and the heirs of his body, for that may be a fee-simple conditional; but it must be shewn that a remainder hath been limited over and enjoyed, or that the issue have recovered after the alienation of his ancestor, or the like.

3 Co. 2. b.
Litt. sect. 13.

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Those that are against the intailing copyhold lands, say that the estate-tail of copyhold land mentioned by *Littleton*, must be understood a fee-simple conditional at common law, or else he contradicts himself; for he says in another place, that all inheritances at common law were fee-simple; but it seems that may be well enough understood of freehold estates; for one may lay a general rule for all lands, meaning freehold lands, which will not extend to copyhold lands.

Cro. El. 907.
Pl. Com
Mansel's case.
2 Cro. El. 717.
Moor 173, 188.
Cro. El. 307,
149.
1 Leon. 175.
Pop. 128.

As that distinction about intailing copyhold lands is taken by my Lord *Coke*, and so of great authority, yet it is not a single authority, but the same distinction is taken and allowed in many other cases. And first there is the case of *Gursey*

ver.

ver. *Sanderfon*, where it is doubted whether a copyhold may be intailed, no custom being found one way or the other ; by which it seems plain, that if there had been a custom found, there had been no question but that it might have been intailed. But then there is the case of *Eriſb* ver. *Rives*, that an intail may be of a copyhold by custom, but not without it. There are ſeveral other caſes warrant the ſame diſtinction, as in the margin. Thus you may ſee the reaſons both for and againſt intailing copyhold lands.

1 Sid. 268, 314.
Mo. 637.

It is made an objection againſt intailing copyhold lands, that thereby the donee muſt hold of the donor ; and the donor being in the reversion, muſt hold of the lord ; and ſo the change of tenants will not be ſo often ; and if the donee commit any forfeiture, the donor muſt take advantage of it, which would be to the prejudice of the lord to have the tenure thus altered. To this objection I think it may be very well answered, That the truth of the caſe is not ſo ; for the donee in tail doth not hold of the donor, but of the lord, as it ſeems every tenant for life doth of a copyhold ; and this ſeems to be very reaſonable ; for a copyhold in fee-ſimple is not like other eſtates in fee-ſimple at common law, but they are only eſtates at will, and ſo he that is the actual tenant at will is tenant to the lord ; for it ſeems to me, that becauſe they are but eſtates at will, there is no diviſion of eſtates, but he

Cro Car. 45.

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he that is actual tenant at will hath all the estate, and there is no part or parcel of the estate left in any body else; and that a tenant in fee-simple of copyhold lands is only he that hath such an estate at will in the lands, as, by the custom of the manor, is not to determine by his death; but that after his death his heir shall be tenant at will; so that when he grants away an estate for life, he has no estate in the lands left in him, but only a power of being tenant at will, according to the custom of the manor, when his tenant for life's estate is ended. And I take it, that in the mean time the tenant for life is tenant at will to the lord, and shall do the services; and if he commit a forfeiture, the lord shall take advantage of it (b). And to this purpose there is the case of *Borenford ver. Packinton*, where the custom of the manor was, that the widow should have her free bench; and it is there taken for granted that she shall hold of the lord (i), and be accordingly admitted tenant, and that the heir shall not be admitted during her life, which plainly proves that the course of tenure of copyhold lands is

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s Leo. 1.

(b) [9 Co. 107. a. *post.* 266. N. CXXIII. Unless the remainder be expressly limited to commence on the forfeiture; in which case the lord shall not take the advantage of it against his own act. 3 *Levintz.* 94. *Com. Dig. Copyh.* (M. 6.) *Viner. Copyh.* (X. c.)]

(i) [But note; in the case of *Borenford* and *Packington*, the widow had the *whole* of the copyhold as her free-bench: and see *ante*, 26. N. XXV.]

not like the tenure of freehold lands at common law ; for in that case, at common law she should hold of the heir ; and though in estates at common law the donee holds of the donor by the same services the donor holds over ; because the statute creating a reversion in the donor, the judges made exposition according to the common law, that because a fee-simple conditional was held of the feoffor by the same services that he held over ; therefore the donee should hold of the donor by the same services he held over ; but at common law the tenant in fee-simple conditional of copyhold could hold of no body but of the lord ; therefore they cannot hold of the donor that have now an estate-tail in copyhold lands, but according to the rule in expounding the statute *De donis* ; viz. by the common law they must hold of the lord, because the tenant in fee-simple conditional of copyhold lands at common law held of the lord, and not of the surrenderor. In the supplement of my Lord Coke's treatise of copyholds (*k*) there is a case cited between *Lane* and *Hill*, where it is said, That when a copyholder makes a gift in tail, he hath no reversion but a possibility ; and the lord shall avow upon the donee for the rents and services, and not upon the donor ; and therefore it was there said, that he in reversion could have no formedon in the reverter.

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Cro. Car. 44.

(*k*) [S. 12. *Traffs.* 185.]

Hob. 177.

1 Leo. 297.

3 Leo. 197.

1 Brown. 179.

A copyholder, by licence of the lord, makes a lease by indenture for twenty years, and then surrenders his estate by the name of reversion of one moiety to one, and another moiety to another; and it was adjudged the reversion passed, for the lease for years passed out of the estate of the copyholder, as well as if the lease had been made by surrender. It seems that which occasioned the doubt in this was, that the lease not being made by surrender, the lessor still continued tenant to the lord; and so whether he might surrender by the name of reversion was the question. This case seems very much to shake the reasons I have before given why the particular tenant shall hold of the lord, and not of him that created particular estates; that is, that there was no reversion left in him; but yet though such interest may pass by name of reversion (for any other name to give it will be very hard to find); yet perhaps he hath not in strictness such an estate in him. However that be, it seems the particular tenant holds of the lord; therefore if tenant in fee of a copyhold surrenders to one for years, it seems to me that the tenant for years shall hold of the lord; for by admittance the lord takes him for his tenant; but if the lease be made by indenture, there it seems he holds of his lessor; for he is not admitted tenant to the lord. It was held that no attornment was requisite, because it is the lord that has the power of chusing and admitting tenants,

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tenants, and not the lessee. It was held likewise, that the rent was to be divided by the halves according to the reversion. Having thus examined the reasons and authorities for intailing a copyhold estate, after which there can be no great reason to doubt, but that copyholds may be intailed ;

It is now requisite that we see the method for the avoiding such intails ; and first. I shall shew, that a recovery with voucher (1) doth not of common right bar the intail of a copyhold ; but that as to the intailing them, custom is requisite ; so *without custom the intail cannot be cut off. The reasons are, that because without an intended recompence in value, no recovery shall bind, and the surrenderee comes-in in the *Post*, by the lord, and is not in in the *Per* by the party, and so no warranty can be annexed to the copyholder's estate. Besides, they have only an estate at will, to which no warranty can be annexed of common right ; for no estate less than a freehold is capable, by common right, of having a warranty annexed to it. And accordingly it was adjudged in *Clun's* case, and all the judges held that the recovery did not bind without a custom. But there is a *quære* whether judgment was given for the plaintiff upon the principal matter, or no ; for it seems to have been a discontinuance (m), and then the defend-

Stra. 1107.
Recovery sans
custom bar
estate-t. & fem-
ble reasonable,
car fuit nul cus-
tome que bar
freehold estate-
t. Mes *Quære*,
car estat-t. in
cop. est create
per custom.
1 Rol. Abr. 506.
Mo. 358. con.
Hob. 177.
4 Co. 27. b.
Cro. Car. 45,
205.
Mo. 358. con.
Cro. El. 391.

* [176]

(1) [See N. LXXX.]

(m) [See *post*. 189.]

Cro. El. 372,
380.
1 Rol. Abr.
506.
Mo. 637.

ant's entry could not be lawful. There are two other cases where this question came in dispute, but was not resolved. It is held, in the case of *Church ver. Wiat*, that a recovery by custom may bar, which implies, that without it it cannot bar. But in the case of *Oldcot ver. Level, Moor 753*. it was agreed that a recovery may be in the court of the lord, that will bar a copyhold; and there it is ~~said~~ generally, and is not put upon any custom.

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Mo. 638.
1 Rol. Abr. 506.

It is debated, whether, if there be a custom to bar the issue of a copyhold estate by surrender to one in fee, whether that be good (n). *Moor 188. Numb. 336. Hill ver. Morfe.*

2 Vernon 585,
705.
1 Sid. 314.
Style 450. con.
2 Saund. 422.

Now my lord *Coke* says, by custom, by surrender the intail of a copyhold may be cut off. It is held to be a good bar of a copyhold estate for the tenant in tail to commit a forfeiture (o), and the lord to seise and grant to another. Or if the tenant in tail surrenders to the use of the purchaser and his heirs, and the purchaser commits a forfeiture, and the lord seises and regrants; this is held to be a good custom to bar the estate-tail of a copyhold, though the tenant in tail be not privy to it. By this it seems plain, that if tenant in tail commit a forfeiture, his issue is bound by it; but the lord can grant to no body else but to him that is intended to have the estate. Thus it seems plain to me, that as estates by the

(n) [See N. LXXXI.]

(o) [See N. LXXXII.]

custom

custom may be intailed, so by the custom also those estates-tail may be cut off by the surrender, recovery, or forfeiture, according to the several customs of manors.

Having thus, in some measure, treated of the rules to know when the general words of an act of parliament extend to copyholds, and when not; and having shewed the reasons both of the one and the other side, about intailing copyholds; it will be now necessary to descend a little farther, and shew those particular acts of parliament copyholds are within, and those they are not within. Copyholds are within the statute of limitations (*p*); for that is an act made for the preservation of the publick quiet, and no ways tending to the prejudice of the lord or tenant. And actions concerning copyholds are as fully and plainly within the words of the act of parliament, as any other actions are, and so there is no reason to exclude them from the meaning. But debt for the fine of a copyholder is not within the statute of limitation.
 2 *Keb.* 536.

1 *Ld. Raym.*
 132.
Mobbs 410.
Ld. Raym. 78.

Str. 253, 258.

The 32 *H. 8. c.* 28. of the husband's discontinuing the wife's land, doth not extend to copyhold land, neither in the letter nor equity of it; for the words are, that no fine, feoffment, or any other act or acts, &c. of the wife's inheritance or freehold, which words plainly mean nothing

Moor 596.

(*p*) [See 3 *Durnf. and East*, 172, 3.]

but a common law estate, and the common law way of conveying; and if the equity of the act should be construed to extend to copyholds, by the entry of the party there would be a tenant without the assent or admittance of the lord.

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Cro. Car. 44.
1 Inst. 44. a.
6 Co. 37.

Neither doth the other part of the act concerning leases to be made by tenants in tail, or husbands of lands in right of their wives, extend to copyholds; for it only extends to those lands that are grantable by deed; yet it was adjudged that a grant by deed of copyhold lands by a dean and chapter, should not be avoided by the successor, by the 13 *El. c. 10.* so that the question will be, Why copyholds should not be within the 32 *H. 8.* as well as the 13 *El.* and if the 32 *H. 8.* doth not extend to copyhold land, then a bishop solely cannot make a grant by copy, to bind his successor (q). My lord *Coke* says, that a grant by copy in fee or in tail, for life or years, is a sufficient demising within the act of 32 *H. 8.* All those books may be thus reconciled, though in truth they are not contrary to one another. When a man is seised in fee of lands in right of his church or wife, or is tenant in tail in his own right, and some of his lands have been granted by copy for the space, &c. this is a sufficient demising within the act, to warrant his demising of them, so as to bind the

1 Inst. 44. b.

(q) [See *post.* 197.]

heir

heir or successor. But where a man is himself tenant in tail of copyhold lands, or is seised in right of his church or wife, there he can make no lease to bind by force of the 32 *H. 8.* because they are not to be made by surrender by force of that act, but by deed indented; and though by licence of the lord, a lease of copyhold may be demised by deed indented; yet the estate is not originally so grantable, to which only the statute extends; and therefore, though copyhold lands have been granted, if they come into the lord's hands, this grant by copy may be a sufficient demising within the act, to warrant his letting them again by deed, according to the act; yet it seems he cannot grant them again by copy; for the act requires that leases be made by indenture: And it is observable in the dean and chapter of *Worcester's* case, though the lands were copyhold, yet, when they came into their hands, they were demised by deed indented, which demise was warranted by the act, upon the former grant by copy. Now then if the 32 *H. 8.* doth not enable grants by copy, it is a great question to me, whether the 13 *El.* doth restrain them; for all leases, made according to the exception of the restraining act, must pursue the qualifications of the enabling act, and consequently must be made by deed; and then if grants by copy be left as they were at common law, ecclesiastical persons may grant lands by copy in fee, with the consent of those persons

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1 Inst. 45. 2.

whose consent is required to bind their successors; I mean if they have copyhold lands in fee, they may grant them by surrender to another: Not that, if they are lords, and they escheat, they may grant them in fee; for upon the escheat they free themselves in their hands, and so within the act.

Cro. Ja. 305.

Hob. 177.

Cro. Car. 24, 5,

44.

Yel. 222.

Grantees of reversions of copyholds shall not take advantage of a condition broken, by the 32 H. 8. (r) nor by the common law, (of covenants they may, 1 Keb. 350. Cro. Ca. 24. 253. *tamen quare* upon Yel. 135.) for then by entry they might come in to be tenants to the lord without admittance; and though he in the reversion may enter by the common law, yet he was tenant before: The act gives remedy to assignees, which he is not properly who comes in by surrender. When a copyholder enters for a condition broken, he is *in statu quo prius*, and therefore shall pay no fine (f); and if the grantee of the reversion might enter by force of the statute, he would be in the same place as his grantor, and so would be in as tenant, and yet pay no fine.

2 Sd. 41, 73.

Copyholds are not within the 11 H. 7. c. 20. (t), for thereby an entry being given to the next heir, he would come in to be tenant without

(r) [See N. LXXXIII.]

(f) [Kitch. 123. a. Co. Copyb. f. 56. Calib. 60 and 67. Cro. Eliz. 239. and *post.* 276. (f) *acc.*]

(t) [2 Cruise, 158, 2 Ves. 358. N. *acc.*]

being

being admitted by the lord. The reason they seemed to go upon in the resolution was, that the lands were copyhold, and so clearly out of the statute. But another reason was mentioned by one judge, which was, that the estate being limited to the baron and feme in fee, 'twas out of the statute 11 *H.* 7. which only mentions estates-tail, and for lives.

Another reason may be, because copyholds are not within the statute 27 *H.* 8. about jointures, and the copyhold lands are within the statutes of bankrupts; for the statute 13 *El.* expressly mentions them; and though the other statutes do not, yet they being made for further remedy in the matter aforesaid, are to be expounded by the former; especially since that hath taken care that no prejudice should happen to the lord. The statute 27 *H.* 8. *c.* 10. for executing uses to the possession, extends not to copyholds (*u*), which is plain from common experience; for when a copyholder surrenders to the use of another, the possession is not executed to the use; for the surrenderee hath nothing till admittance. For 'twas not the intent of the statute to execute the possession to the use of copyhold lands; for then a tenant would be introduced without the lord's consent. Neither doth the branch of that act concerning jointures extend to copyholds; so that if a jointure be made

Cro. Car. 559,
568.

Cro. Car. 44.

(*u*) [2 *Vef.* 257. *Sand. on Uses*, 229. *acc.*]

to a woman in copyhold, that will be no bar to her dower. The reason is, because the words of the proviso being general and introductive of a new law, to bar women of their dower, where they were not barred by the common law, there's no reason to extend them, since an estate in copyhold lands is very disadvantageous to the woman who must pay a fine to be admitted, which she may not be able to do, and thereby will commit a forfeiture; besides a woman is not dowable of common right of copyhold lands; and so it seems to have been out of the regard of the statute; and my lord *Coke* defines a jointure to be competent livelihood of freehold; so that it must be an estate of freehold. And in another place he says, a tenant by copy hath no freehold; but yet the statute of *Merton* that gives damages in a writ of dower, where the husband died seised, extends to copyholds (*w*); and yet seised is properly applied to freeholds. And my lord *Coke* says in his *Treatise of Copyholds* (*x*), that a freehold is twofold in respect of the state of the land; and so any body that has an estate for life, in lands, is a freeholder; and so copyholders may be freeholders. And the other sense of the word Freehold, as 'tis opposed to copyhold land; but *quere* of this distinction, for it seems not to be

1 Inst. 36. b.
2 Inst. 325.
Cro. Car. 43.
4 Co. 30.

1 Inst. 58. b.

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(*w*) [*Moore*, 410. *Ca.* 559. *Cro. Car.* 43. *acc.*]

(*x*) [*S.* 15 and 16.].

law.

law. For he says generally in another place, ^{1 Inst. 43. b.} that tenant in fee, tail, and for life, are said to have a freehold, because it distinguishes it from terms for years and copyhold lands; so that he there plainly saith, that a man cannot have a freehold in copyhold lands (y); for if he could, where would be the distinction? Therefore I take it, though a feme in a writ of dower of copyhold lands shall recover damages by the force of the statute of *Merton* (x), yet it is by the equity of the statute, and not by the words.

The statute of *West. 2. c. 3.* in all its branches <sup>3 Co. 9. a.
2 Inst. 343.
Cro. Ca. 43.
1 Inst. 369. b.</sup> extends to copyholds; for it is an act made to redress wrong, and no ways prejudicial to the interest either of lord or tenant. The *32 H. 8. c. 9.* against champerty, extends to copyholds; for the words are *if any bargain, buy, or sell, any right or title*, so that they are within the words; and the act being made to suppress wrong, is within the equity of it, neither lord nor tenant being prejudiced by it.

It is said by *Yelverton, arguendo*, that the ^{Cro. Car. 43.} *32 H. 8. c. 28.* which gives an entry instead of the *cui in vita*, extends to copyhold lands; for the act was made to redress a wrong, and it is [185] no prejudice to the lord or tenant, that the wife

(y) [See N. LXXXIV.]

(z) [See last page. *Copyholders* are not within the statute of *Merton* (c. 10.) to make attornies to do suit; but freeholders in ancient demesne are. *2 Inst. 100.* and see *post. 229. (o).*]

shall enter; and the general words of the act that give a *cui in vita*, have been allowed to extend to copyholds. The words of the statute 32 H. 8. are, *being the inheritance or freehold of his wife*. So if this act doth in this branch extend to copyhold lands, as it seems to me it doth, then one and the same act of parliament, in one part of it, will extend by general words to copyhold, and the other not; for the first part of the act of leases to be made by tenant in tail, extends not to copyhold lands.

Mo. 596. con. 3

Cro. Car. 44.

The 31 & 32 H. 8. about partitions, extend not to copyhold, because the act provides it shall be done by writ of partition, and copyhold lands are not impleadable at common law.

(a) The stat. of *West. 2. c. 18.* which gives the *elegit*, extends not to copyhold, for if it did, the lord would have a tenant brought in upon him without his admittance or consent.

[186] : By the 2 *Ed. 6. c. 8.* it is expressly declared, that a copyholder shall have the like traverses and remedy, where his interest is not found by the office, as freeholders and others have.

By the 1 *Ed. 6. c. 14.* it is expressly provided, that no copyholds should come into the king's hands by the dissolution of monasteries,

(a) *Savil's Reports, Heydon's case*, pag. 66, pl. 138. A copyhold not forfeitable by outlawry. *Lit. Rep.* 234. 1 *Lev.* 99. *Hetl.* 127. [See *ante*, 160, n. (1); and *post.* 242. 328.]

which clause, it seems, was put in, that no prejudice might be to lords of manors.

The forging a court-roll is expressly within the 5 *El. c. 14*. A recusant (*b*) convict that repairs not to his usual home, or removing from thence above five miles distance, forfeits his copyhold to the lord for the offender's life.

The 16 *R. 2. c. 5*. which makes it a forfeiture of lands to purchase bulls, extends not to copyholds, for the prejudice the lord should sustain if the king should have the lands. The 17 *Ed. 2. c. 10*. concerning the wardship of idiots' (*c*) lands, doth not extend to copyhold. The stat. of fines (*d*), because made to avoid controversies, and no ways prejudicial to tenant or lord. In the supplement to my lord *Coke's* Treatise of Copyholds (*e*), it is said that the 32 *H. 8. c. 8*. concerning remedy for arrears of rent extends not to copyholds. To prove which, a case is cited in *Leo.* which is this: A lord of [187] a manor, whereof were divers copyholders, ^{4 Co. 126. b.} ^{9 Co. 105. a.} granted a rent-charge for life, and afterwards made a feoffment of the manor to *J. S.* in fee, who granted a copyhold for life to *B. J. S.* died, and the grantee of the rent died, and his

(*b*) [See *stat. 31 Geo. 3. c. 32*.]

(*c*) [See *post. 223. (g)*.]

(*d*) [4 *Hen. 7. c. 24*. Here is, seemingly, an omission of the words—"does extend to them."—See 9 *Co. 105. a.* and *post. 207. (e)*.]

(*e*) [*S. 21. Tracts, 216,*]

executors distrained for the arrears in *B.*'s copyhold lands; and it is there said it was held by the court, that the distress was not well taken; and the reason is, because the words of the statute are, *claiming only by and from him*; and the copyholder doth not only claim by his grantor, but by custom. This opinion, as it seems, was upon the first hearing of the cause; for the very case is reported quite contrary by the same reporter; and it is said to be resolved by all the judges but *Fenner*, that the copyhold should be charged with the rent-charge; for the custom is no part of his title, but only appoints how he shall hold; and since it was charged in the lord's hands, it is plainly within the intent and meaning of the act, as well as the words, to be charged in the copyholder's hands; and to this purpose there is a case in *Dyer* adjudged. But if the case were adjudged, that the lands should not be charged in the copyholder's hands, on that reason, that he doth not claim only by and from, &c. but by custom; yet that would never warrant so general a conclusion, that the statute in no other part should extend to copyholds; and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain. But turn the tables, and if the act of parliament doth in point extend to copyholds, as lands that are claimed by, &c. and that which in this case only doth make a doubt, is over-ruled, then
this

2 Leo. 152.
3 Leo. 59.
Mo. 812. con.

Dyer 270. b.
1 Leo. 4.

[188]

this is a strong argument, that in other cases, where that is not which occasioned the doubt, the statute shall extend to copyholds, especially since the act was made to remedy an apparent wrong, and doth no harm either to lord or tenant.

It came to be a question, whether the 29 *El.* ^{1 Leo. 97, 8. Owen, 37.} c. 5. of recusants (*f*), extended to copyholds, and two seemed of opinion it did, and one took this difference; when a statute is made to transfer an estate by the name of lands, tenements, and hereditaments, copyhold is not within such statute.

Copyholds are not within the 31 *El.* c. 7. of cottages (*g*). 1 *Bulf.* 50. 2 *Inst.* 737.

If the lord's feigniory, custom, or services are impeached (as it seems they must be, by a statute which transfers an estate in copyhold land without the lord's admission), that act extends not to them; but if the customs, &c. are not altered, then the statute doth, because that act doth not make another tenant to the lord; and it was urged by him (*h*), that by force of that statute the queen was only to have the profits, and no estate, and so the act did extend [189]

(*f*) [See the *stat.* 31 *Geo.* 3. c. 32.]

(*g*) [This statute is repealed by 15 *Geo.* 3. c. 22. See further, *Com. Dig. Copyh.* (N) & (O). *Viner, Copyh.* (O. d.) *Co. Copyh.* f. 52. 56. *Suppl.* f. 21. *Fisher on Copyh.* c. 14. *Cowp.* 710. *Cro. Car.* 44.]

(*h*) [*Mamwode*, Chief Baron.]

to copyholds. The statute says, the queen shall seise and take into her hands two parts of the lands, tenements, and hereditaments. *Quære* of this case (i). It was said *arguendo* of this case, that the 13 *El. c. 4.* for making accountants' lands liable to pay debts, extends not to copyholds; which is a reasonable opinion; for power is given by that act to the queen to make sale by her letters patent, which would be a very great prejudice to the lord.

4 Co. 23. 2.
Cro. El. 380.
392.
Mo. 358.

[190]

I shall now shew what are discontinuances of estates in copyhold lands. If there hath been a custom in a manor, that plaints should be prosecuted there in nature of real actions, if a recovery be had upon such plaints against tenant in tail, it is a discontinuance; for since the custom warrants the recovery, it is an incident to such recovery by the common law, that it should be a discontinuance, which it seems is drawn from the nature of the thing that a judgment given in a court of judicature ought not to be avoided, but by matter of as high a nature, viz. by a recovery in a court of justice, and not by the entry of the party that hath right.

4 Co. 23. 2.

A man seised of copyhold land in right of his wife, surrenders to the use of another in fee; this is no discontinuance, but the wife may enter after the death of her husband; for by the surrender he gives up no more than he

(i) [Case of Saliard v. Everat, 1 *Leon.* 97.]

had,

had (*k*), and therefore could not give away his wife's right; though before entry she cannot be said to be tenant, because the surrenderee is by the lord's admittance made his tenant. And this is not like a feoffment at common law (*l*), which being so notorious a way of conveying estates, the wife's entry was taken away, the whole estate being past away to the feoffee for the benefit of strangers, who could never have known whom to have brought their *præcipe* against, if the estate did not pass by so notorious a conveyance; and then if she still might have entered, they could never know whether she were a trespasser, or in whom the freehold was rightfully vested. But in case of copyhold lands, as there is no such inconveniency, so the nature of the conveyance will not admit of such exposition; for a surrender is but a giving [191] or yielding up that estate one hath from another; and it is in the nature of the thing impossible to surrender more than one hath. Therefore if tenant for life surrenders to the use of another in fee, it is no forfeiture, for it may be seen by the court-rolls who is tenant, and so the stranger is at no loss to sue; and estates at common law are guided by those rules that do not extend to copyholds, unless there be a particular custom for it. It seems when a tenant for life

Cro. El. 717.
contr.

Mo. 753,

4 Co. 23.

Ld. Raym. 1145.
lb. 630a.

(*k*) [*Ante*, 117, &c. *post*. 256. (*g*); 277. (*x*).]

(*l*) [*Ante*, 118, &c.]

makes a surrender in fee, though nothing can pass by the surrender but what he hath; yet when the lord admits the surrenderee according to this surrender, then he hath a fee, for the lord hath an estate to pass a fee-simple (*m*). Another reason, besides that of passing the estate by feoffment and livery, for the benefit of strangers, why a discontinuance should be made by such passing of estates, is, because a warranty usually is annexed to such estates (*n*); and if the rightful owner might enter, the benefit of the warranty would be lost; and warranties cannot be annexed to copyhold estates (*o*). Notwithstanding this, there are cases that a surrender is a discontinuance of an estate-tail in copyhold lands, and my lord *Coke* says, that a surrender by custom may bar an * estate-tail (*p*): but these opinions for discontinuing by surrender do not seem to be grounded upon that reason or authority, as the contrary opinion is; for there are more cases against it than for it.

2 Leo. 95.

Mo. 352. 596.
Cro. El. 717.
484.
Brownl. 121.
2 Inst. 60. b.
Mo. 358. 753.
2 Leo. 95.
2 Inst. 248. a.
Cro. El. 148. 90.
4 Co. 25.

* [192]

(*m*) [See *post*. 255. N. CXIX.—257. N. CXX.]

And note, that though a person be wrongfully admitted to a copyhold, yet he who has right may enter and oust him. So if he die seised, the descent will not toll an entry (*ante* 160); nor does it in itself amount to a disseisin. See *post*. 281. N. CXXIX. and *Cro. Jac.* 36. pl. 10.]

(*n*) [See *ante*, 117.]

(*o*) [See *Moore*, 358, 9. *Cro. Eliz.* 380. pl. 32. and *ante*, 176.]

(*p*) [See *ante*, 177. N. LXXXI.]

An infant surrenders, it is no discontinuance, but he may enter (*g*). A copyholder in fee surrenders to the use of another in fee upon condition; at the next court the surrender is presented as an absolute one (*r*); and the surrenderee being dead, his two daughters are admitted; the surrenderor releases to them, and then ousts them. In this case were two questions: first, Whether the presentment was void? and adjudged it was; because the warrant to ground it was not pursued, and so as no warrant at all to make such a presentment; and then without question, the presentment had been void: but if the surrender were conditional, and the presentment too, but the steward had entered it upon the roll absolutely, the roll being no estoppel nor record, the admittance is good; and the party may plead it or give it in evidence, as the truth of the case was. The next question of the case was, Whether surrenders being the only way of conveying copyhold estates, the release should transfer a right? and it was adjudged it should (*s*); for the heirs being admitted, the lord had a tenant to answer his services; and the release to that tenant operated to extinguish a right; but if a disseisin be made of a copyhold, the disseisee's release will

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(*g*) [*Moore*, 597. ca. 814. acc.]

(*r*) [See *Co. Copyb.* f. 40. 4 *Co.* 25. a. and *post.* 254-336.]

(*s*) [See *ante*, 157. N. LXIX.]

signify nothing (*t*), because the disseisor is no tenant, and the lord hath admitted no body to answer him his fines and services.

4 Co. 28, 9.

Ld. Raym. 864.

The lord hath only a customary power to make admittances according to the surrender, and so far as he executes that power, the admittance is good; but where he goes beyond that power, he acts without a warrant, and it is void (*u*). But if the surrender be absolute, and the admittance conditional, the admittance is good, and the condition void; if the surrender be conditional, and the admittance absolute, that is void. If the surrender be to the use of *J. S.* and the lord admit *J. N.* this is void, and he may afterwards admit *J. S.* If he admit *J. S.* and a stranger, *J. S.* takes all, for the stranger's admittance is void. The reason of these diversities is, because when the lord acts contrary to his warrant or power, his acts are void; but when he acts according to his power in one thing, but beyond it in another, for what he acts according to his power he hath a warrant, but for what he acts beyond it he hath no warrant, and so it is void.

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1 Inst. 52. b.
Cro. El. 373.
4 Co. 23. a.
Co. 10.

If copyhold lands have been usually granted in fee, a grant to one in tail (*w*), for life or years, is good.

(*t*) [See *ante*, 157. N. LXIX. and *post*. 301.]

(*u*) [See *post*. 255.]

(*w*) [See *ante*, 165. N. LXXIX.]

And see further, *Com. Dig. Copyb.* (C. 8.) to (C. 12.) *Viner, Copyb.* (P).]

The

The admittance of tenant for life is an admittance of him in remainder (*x*), as to vest the estate, but not to prejudice the lord of his fine (*x*), saith my lord *Coke*; therefore upon the death of tenant for life, he shall be admitted, and pay a fine; for though his estate of tenant for life vests, yet he was never tenant to the lord for the admittance to which he pays his fine. But if a copyholder in fee surrenders to the use of one for life, and the tenant for life dies, he may enter without any new admittance, or paying any fine; for he had his old estate in him, and he was admitted tenant before (*y*); yet it was said by *Popham*, in *Guppin* and *Bunny's* case, that one fine is due in such case; but it is but of little authority; for the point of the case was, Whether the admittance of tenant for life was the admittance of him in remainder? and because it was made an objection, that if it were, the lord would lose the fine, which *Popham* answers by saying, There is none due in such case; which objection my lord *Coke* answers by saying, That though the estate be vested in the remainder-man, yet a fine is due.

Cro. Jac. 27.
4 Co. 22, 3.
Mod. 120.
3 Lev. 308.
1 Leo. 174.
Cro. El. 148.
149. 504.
1 Roll. Abr.
505.
Stra. 1042.

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The case of *Dell* and *Higden*, as it is reported by *Moor*, is also contrary to the cases

Moor 357.

(*x*) [See *ante*, 163. N. LXXVII]

(*y*) [9 Co. 107. a. Ca. Copyh. l. 56. p. 129. 1 Leon. 174. ca. 244. acc.]

before ; for there it is said but one fine is due ; but otherwise it is of a reversion ; which distinction is laid quite cross to what it is in the cases before, and seems to have been a mistake in the reporter ; for as it is against the cases before, so it is against reason. The same case is reported by my lord *Coke*, and no such resolution is mentioned in his report of it ; and it is observable, that nothing in that case, as reported by *Moor*, seems to have been either upon reason or authority, but one point, which is the single resolution, as the case is reported by lord *Coke*. A copyholder surrenders to the use of his last will, the copyhold estate still remains in the surrenderor ; for all the design of the surrender was, that he might dispose of it by will, not to vest any interest in any body, or to give away the power of disposing of it (z) ; therefore when a copyholder surrendered to the use of himself for life, then to his son for life, then to the use of his own last will, and the son died, and the father surrendered to the use of another in fee ; held, that the copyholder might dispose of it in his lifetime, notwithstanding the surrender to the use of his last will.

4 Co. 23. a.
Cro. El. 441.
[196]
4 Co. 23. b.

Every lord of a manor that hath a lawful estate in the manor, whatever it be, either fee, tail, life, years, or at will, may make voluntary grants of copyhold lands which come into their

(z) [See N. LXXXV.]

hands; which grants shall bind those that have the inheritance of the manor, whatsoever defects the lord that made the grant may lie under; provided the ancient rent, custom, and services be reserved; for if the estate a copyholder hath in lands, be an estate that hath been demised and demisable time out of mind by copy, by the lord, it is sufficient to support his estate by the custom; so that no estate is required to be in the lord, but only that the copyhold lands should be demised and demisable time out of mind by the lord for the time being; so that be he but lord, it is enough; so that the custom, which warrants these estates, only requires that they should have been demised and demisable by the lord for the time being; but it requires no estate to be in that lord in particular, so that he be but lord; and custom is the life and soul of a copyholder's estate; for the copyholder doth not derive his estate out of the lord's estate, (for then it would determine with his estate,) but from the custom, [197] which only requires a lawful lord for the time being, and therefore no regard is had to the person of the lord; for if a voluntary grant be made by baron and feme, it shall bind the feme, notwithstanding the coverture. So a grant made by an infant, *non compos*, &c. shall bind for ever; so if the queen be tenant for life of a manor, and a copyhold of inheritance escheat, she may grant it by copy, and that grant shall

bind the king; for the custom of the manor shall bind the king, she being *domina pro tempore*; so it seems of any body else. My lord *Coke* says, the successors of bishops, prebends, vicars, &c. are bound by such a grant, by which it is evident, that ecclesiastical persons are not restrained from making grants by copy (a). The act requires the leases made should be by deed indented, which shews the intent of the makers was not to restrain grants by copy; and a bishop being lord, the copyholder's estate is more derived from custom than from him; for it determines not with his death. So it seems, if it be made without consent of dean and chapter; for he hath a lawful estate, and so no defect can vitiate the grant; so when the temporalities come into the king's hands, he is bound, which shews that a grant by him alone is good; for if the consent of dean and chapter were requisite, and had, there is no question but that grant should bind, if it were out of the statute, which it must be to bind any body.

4 Co. 22. 2.

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4 Co. 24. 2.
2 Leo. 45.

If any person that hath a tortious or defeasible (b) estate of inheritance, as a disseisor, or feoffee of a disseisor, tenant at sufferance in a manor, make *voluntary grants upon escheats or*

(a) [4 Co. 21. b. Co. Copyb. f. 34. *Traçts*, 75. See *ante*, 179.]

(b) [Sec *post*. 201, 2. 285. 313.]

forfeitures,

forfeitures, they shall not bind him that hath the right; for he is not *dominus* within the meaning of the custom, but he only that hath a lawful estate; but admittances *upon surrenders or descents* made by such as have defeasible estates, are good, and shall bind him that hath right; for that he was compellable so to do, and it was no more than the rightful lord must have done. In such grants made upon forfeitures, &c. the ancient services must be reserved, and the customs also (c). The reason of this seems to be because there is nothing but custom to warrant the grant by copy, which ought to be strictly pursued as to the estates, customs, services, and tenure, or else it is not the estate that was demised before. But yet if there be a copyholder in fee, it seems the lord may release part of the services, and not do any prejudice to the copyholder's estate; for there is an estate there in being that appears to be the old estate; but when the lord grants a new estate by copy, since it is an estate against common right, and warranted only by custom, that must be strictly pursued to bind the heir. My lord *Coke* says, If the ancient customs and services be not reserved, the grant by copy will not bind the heir or successor. This being spoken so generally, seems to intimate plainly, that if the ancestor

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(c) [*Co. Copyb.* l. 41. 2 *Bl. Comm.* 370. ch. 22, and *post.* 221. (a).]

hath a fee in the manor, and he grants without observing the custom, his heir may avoid it, because it being a grant against common right, the custom must be pursued. (*Quære, Cro. El.* 662. 1 *Rol. Abr.* 499.) Besides, he puts heir in the same equipage with successor; and if he means with the consent of dean and chapter, then a bishop had as much power as an ancestor; if he means without the consent, yet it is not that should avoid the grant, but the non-reservation of the ancient tenures. And so strict is the law in this point, that if the rent be reserved in silver, where it anciently was in gold; or payable at two feasts, where anciently it was payable at one feast; or if two copyholds escheat, one usually demised for twenty shillings, and the other ten shillings, and he demises both for [200] thirty; so if three acres escheat, held by three shillings, and he grants one by copy, reserving one shilling, this is not good; for the custom, which is the only thing that warrants such grants, must be pursued.

4 Co. 23, b.

If tenant in tail have a copyhold escheat to him, *quære*, if he may not grant it by copy again, so as to bind the issue? He may; and these cases of reservations are like the resolutions in my lord *Montjoy's* case, 5 Co. where the same points were resolved upon a particular act of parliament, restraining the alienation of tenant in tail, other than for three lives or twenty-one years, reserving the ancient rent; for there it

was

was adjudged the act ought to be strictly pursued ; and so here the custom, being a particular authority, ought to be so too. But yet such grant by copy shall bind the lord during his life, and he having admitted the tenant as a copyholder, he shall be so to him, though his heir may avoid the grant. There are many cases of grants by the lord for the time being, that are good and binding, and they seem to depend upon the same reason with the cases before. If a man makes a feoffment in fee of a manor, upon condition, and the feoffee grants estates by copy, and then the condition is broken, yet the grants by copy shall stand good ; for he was *legitimus dominus pro tempore* ; and yet it is a rule, that when a man enters for a condition broken, he shall be in of the same estate he was in before ; and therefore shall avoid all mean charges and incumbrances. But the copyholder doth not claim his estate out of the lord's grant, but out of the custom ; and if the grants were made after the condition broken, yet it is all one ; for before entry the feoffee hath a lawful estate, and the feoffor may wave the advantage of the condition broken (*d*). But if a lease be made of a manor for years (*e*) upon condition to be void upon the breach of a certain condition, and the condition is broken, no voluntary grants made afterwards

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Dyer 344. a.
4 Co. 24. a.

(*d*) [*Co. Litt.* 218. a. and see *Co. Copyb.* f. 34.]

(*e*) [*Touchst.* 139, and *Co. Copyb.* f. 34.]

shall bind the lessor, because the estate of the lessee is void; but if it were for life, &c. then the grants were good. If an infant infeoff one of a manor, and the feoffee makes voluntary grants, the entry of the feoffor shall not avoid them. In this case, and in cases of grants made after the condition broken, the grantor hath a defeasible title; and yet the estates are good that are granted to the copyholders; yet my lord *Coke* says, that if any one has a tortious or defeasible estate, subject to the action or entry of another, his voluntary grants shall not bind. To reconcile this, it seems my lord *Coke* must be understood, that when any one hath an estate, to which another hath right at present, that the owner of such a defeasible estate cannot make voluntary grants. But the infant and the feoffor have no such rights; for the feoffees, in both cases, have lawful and rightful estates in the land, till they are defeated; and before they are defeated the feoffors have no right. A man seised of a manor in fee hath issue a daughter, and dies, his wife, *privement enseint* with a son; she makes grants by copy; afterwards the son is born: Feoffee of a manor, on condition to infeoff another, the next day, makes voluntary grants by copy: Lord of a manor commits felony, and after exigent granted he passeth away copyhold estates, and then is attainted; if he were convicted by verdict or confession; in all these cases voluntary grants by the lord are good; for he was

dominus

dominus pro tempore (*f*). My lord *Coke* says, that if a lord acknowledge a statute, and then makes a voluntary grant, the lands are not chargeable. But *Moor* is against this (*g*), and there are cases where the grant of a rent-charge, in such case, shall bind the copyholder (*b*); but there is some difference between the two cases; for in case of a rent, the lands were charged with it by the grant, but in case of the statute, the lands were only chargeable, and before the actual charge, were granted over; (*vide Moor* 811.) and therefore may be compared to the case where a man makes voluntary grants, his wife shall not be endowed of those lands, because the copyholder is in by the custom, which was long before the title of *dower* accrued to the woman. It seems the reason of this case is, because the woman had no title of *dower* to those copyhold lands while they were in the hands of copyholders; and the custom warrants the granting them again, since they have been always grantable by copy; and the estate would be destroyed, if she were dowable of them; *Quære* of the case of the statute? But if the heir, before assignment of dower, grant lands by copy, then it seems she may avoid that (*i*); for she had then

Moor 94.

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Brownl. 208.
1 *Leo.* 16. 100.
4 *Co.* 24. 2.

3 *Co.* 63. b.
1 *Leo.* 16.
Dyer 251. a.
Moor 236. 7.

(*f*) [*Co. Copyh.* c. 34.]

(*g*) [*So*, 1 *Leon.* 4. *Ca.* 8. But see the next note,]

(*b*) [See N. LXXXVI.]

(*i*) [See n. (6) to *Co. Litt.* 58. b. acc.]

3 Inst. 58. b.
Dyer 151. 2.
4 Co. 24. a.
Owen 115. 119.

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a perfect title of *dower* to those lands. Those things that take their essence by the lord's grant and interest, have no longer continuance than his interest has; therefore if the lord, tenant for life of a manor, licence the copyholder to alien, and dies, the licence is gone (*k*). Lord of a manor deviseth by will that his executors shall make voluntary grants of copyhold estates to pay debts; they have no interest, nor are they *domini pro tempore*; yet the grant is good. Tenant by sufferance can make no voluntary grants to bind the owner. Grants made after alienation in *Mortmain*, and before the entry of the lord, are good. Grants by a parson before induction, are not good. So, if after institution and induction he reads not the articles, the grant is void to bind the successor (*l*); *tamen quare*, Guardian in socage may grant copies, but not a bailiff.

My lord *Coke* says, that if there be lessee for years of a manor, and he grants lands by copy in reversion, that unless the reversion happen in possession before the lease for years expire, the grant is void. The reason seems to be, because now he makes a grant, which is only to take effect after his estate ended in point of possession, and so will bind the future lord's interest, but

(*k*) [2 *Brownl.* 40. *Co. Copyh.* f. 34. *TraAs.* 72. *Post.* 298, 9. *acc.*]

(*l*) [*Co. Copyh.* f. 34.]

let his own be at large, without any grant by copy, which by construction they will not admit, but take the rule strictly, that he that is *dominus pro tempore* of a particular estate, must grant in possession. And to this purpose is my lord of *Oxford's* case; but it is agreed on all hands, that if it come in possession during the continuance of the lord's estate, that is good. But there is the case of *Gay* ver. *Kay*, where it was held good notwithstanding it did not come in possession (*m*); and there it was said that it was custom only warranted the grant, which might as well warrant a grant in reversion as possession; and if the custom will warrant the grant of a fee-simple in possession by such particular tenant, why not a reversion in fee? And the like resolution was made in *Sir Peter Carew's* case. It seems the first ground of this law, That the lords for the time being might grant copyhold estates, was, because copyholders were only tenants at will; and so, though the lord *pro tempore* had but a particular estate, and yet granted the lands in fee, yet that was no prejudice, but rather an advantage to the lord that was to have the manor, in respect of the service he was to

Moor 95.
Cro. El. 661.
1 Roll. Abr.
499.
Hutley 54.
Moor 147.

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(*m*) [See *Com. Dig. Copyh.* (C. 3.) and n. (4) to *Ca. Litt.* 58. b. *acc.*

And as the estate of the grantee is vested immediately on the grant made, though the possession is to commence at a future time, it should seem that such estate is not devisible on such contingency.]

have

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s Co. 63.

have done him afterwards; and if he had a mind he might put out his tenant at his own pleasure. But this uncertainty of the copyholder's estate being found inconvenient, it was afterwards adjudged, that he should retain his land, and not be subject to the pleasure of the lord; but the other part of the law was left as before; *viz.* that lords for the time being might grant lands in fee, though they themselves had but a particular estate; and this custom being continued to this day, is what warrants the grants by copy. For it is most certain, those estates that are granted by lords that have a particular interest, cannot be derived from the interests of the lords; for if they were, they must determine when the lord's estate determines; for *nemo plus juris dare, &c.* therefore where there hath been a custom that such lands have been granted time out of mind, by copy in fee by the lord, there the custom gives the estate, and the lord is but custom's instrument to convey even where he hath them in his own hands, and may, if he pleases, retain them. And to this purpose is the case of *Swain*, which seems to be a stronger case than before. Queen *Elizabeth* seised of a manor in fee, parcel of which manor was a rod and a half copyhold land, and demisable by copy for one, two, or three lives, and then the queen demised the manor to one for twenty-one years, *exceptis omnibus boscis, &c.* who assigned his interest to one *J. P.* the queen

queen grants the reversion to S. and his heirs, the lessee attorns, and then holds a court and grants a house and the said rod and a half of land by copy for life, upon which some trees grew; and within the manor there is a custom that every copyholder, tenant for life, had used to take all trees growing upon his copyhold land for fuel in his copyhold house, &c. and the copyholder cut down the trees in that rod and half for that purpose, and he in the reversion brought trespass; but it was adjudged for the defendant, that notwithstanding the severance he might take estovers; for when he was in by copy, he claimed by custom, which was above the severance. Therefore if copyholders have used to have common in the lord's waste, or estovers in his wood, or any other profit apprender in any other part of the manor; and the lord alien the waste or wood by feoffment or fine, and then grant an estate by copy, the copyholder may take the profits in the hands of the alienee; for the custom unites the incident to the principal, as to the copyholder who claims *paramount* the severance. If the alienation be by fine (o), and he doth not claim within five years, it seems he is barred. This proves that the copyholder claims by custom, not by the lord; for if he did, the feoffment would bar him of his common; the same case

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(a) [See *ante*, 186. and *Fisher on Copyh.* 120. *acc.*]

Moor, 811.

[208]

4 Co. 24. b.

Cro. Jac. 572.
4 Co. 26. b.

is reported by *Moor*. Queen *Elizabeth* seized of a manor in fee, grants copyholds, parcel of the manor, to one in fee by copy, and then grants the inheritance of those copyhold lands to another in fee; the copyholder makes his will, and devises his lands to *Murrel* the plaintiff in fee, and then surrenders his copyhold land to the use of his last will, into the queen's hands; and between the heir of the said copyholder, claiming by descent, and the devisee, it came to be a question, Who should have the land? And it was resolved, that though the copyhold was severed from the manor, yet it still remained copyhold land; for it would be very unreasonable that it should be in the lord's power to destroy the copyholder's estate; and the granting the inheritance over to another, cannot vest any greater interest in the copyholder, so as to make his land free, any more than it can destroy the grant by copy: And it was further resolved, that the copyhold descended to the heir, notwithstanding the surrender; for that was void, because the lands were not parcel of the manor; and the devise only will not pass copyhold lands; and the copyholder shall pay all those services to the feoffee of the inheritance, that he used to pay, without keeping a court; for all those services that arise by reason of a court, he is excused from, because the feoffee can keep no court; therefore suit of court, and fines for alienation and admittance are gone; for now

the copyhold cannot be sold, nor the feoffee make admittance or grant by copy; for he is not *dominus pro tempore*, the land being severed from the manor; but all those things that were forfeitures before, are so still, if the copyholder be obliged to do them, as waste, making a feoffment. So if the land were of the nature of *Borough English*, &c. it still remains so (p). There is no way for such a copyholder to alien, but by decree in Chancery against him and his heirs. As this case is reported by *Croke*, it is said, the copyholder's heir shall pay a fine, as before; but how can that be, when there can be no admittance (q)? And *Coke* is against this; the case is but shortly reported by *Croke*.

Cro. El. 499.
Moor 393.

Cro. El. 252.

When the lord grants the inheritance of all the copyhold lands, the grantee of all such may hold a court (r), take surrenders, and make admittances, though the grantee of one copyhold cannot; and this diversity is taken by my lord *Coke*, in *Neal* and *Jackson's* case, reported also by *Croke*; and the same point is also resolved in another case of my lord *Coke's*; for though it be not a manor strictly, because there are no

4 Co. 26. b.
Cro. El. 395.

(p) [See 2 *Leon.* 208. ca. 257. 4 *Co.* 25. a. *Robinsf. Gavelk.* b. 1. c. 5. and see also *post.* 212. N. XC. 313. (l).]

But note, that in this case the severance of the copyhold from the manor is merely by the act of the lord; and, as the copyholder's concurrence was wanting, his estate shall not be prejudiced.]

(q) [See *post.* 218. (b).]

(r) [See *post.* 319.]

Q freeholders;

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1 Inf. 58. a.

Cro. El. 39.
cont.

freeholders (s); yet as to the granting copyhold estates, it is a manor; for in truth every manor, consisting of freeholders and copyholders, hath two courts, one a *Court-Baron*, and the other a *Court for Copyholders* (t), whereof the steward is judge; and therefore what reason is there, since these are in effect two several courts, and there are several judges of them (u), that the want of freeholders should hinder the grantee from keeping a court for granting estates by copy, especially, since the consequence is so fatal? and therefore if the lord releases the service and tenure of his freeholders, yet the lord may keep a court for his customary tenants: And so though the lord cannot make two manors of one, consisting of demesns and services, yet by his own act, he may make a manor of copyholders. This seems to be but a division of the courts, which before were in one; for a manor seems to be so to two intents, as to the freeholders, and as to the copyholders; and so in effect seems to be a double manor; and therefore are there several courts in effect, and several judges, according to the matter that is before them; and so it is no new making of a manor to grant the inheritance of the copyholds, but only to put that into the hands of two men, which before was in one; and yet was as much two manors then as now.

(s) [See N. LXXXVII.]

(t) [See N. LXXXVIII.]

(u) [See N. LXXXIX.]

But notwithstanding all this, there are precedents that such grantee of the inheritance of copyhold lands, cannot keep court, no more than the grantee of the inheritance of one copyhold. And it is said, that a writ of error was brought upon the aforefaid judgment; and because the opinions of the justices and barons were, that the judgment was erroneous, the party compounded, and the plaintiff in error had the land, and the defendant the corn upon the ground. There is the case of *Bright and Forth*, where a recovery was suffered of a manor, excepting the land in *Bradway*, in which were divers copyholders for life; which part in *Bradway* was afterwards conveyed to the countess of *Darby*, who granted a copyhold for life. In this case it was resolved, that the grant was void, because there was no manor; and though it was insisted on by one of the counsel, that there was a difference betwixt copyholds of inheritance and copyholds for life only; for when they were life, they could not be granted again; yet it was answered by *Anderson*, that it was all one; and indeed what reason can there be for a difference why one should not be granted again as well as another; and why a court may be kept in one case, and not in the other? This case was *Mich. 37 & 38 El.* and in *Trin. 36 El.* [212] *Anderson* was of a quite contrary persuasion, and held that a lessee of the freehold of copyhold lands might hold a court and grant copies;

Cro. El. 102.

Cro. El. 442.

Cro. El. 395.

which shews there is a material difference between the two cases ; or else *Anderson* was of a very variable temper. And indeed, this case doth not seem to contradict the cases before ; for there the grant was of the inheritance of all the copyhold lands ; here but of part ; and a man cannot, by his own act, create two several courts and manors (*w*) ; but when the grant is of all the copyhold lands, there is still but one court for copyholders, which there was in effect, when the manor consisted of freeholders. But be it an authority against the granting lands by copy, it seems to be but weak, being both against reason and several other cases ; for after this it was held, that where a woman was endowed of the third part of a manor, and among the rest of a copyhold tenement, that she might grant it by copy ; and for what appears, this was the only copyhold tenement that was granted her. But this being done by act in law, no prejudice could accrue to any body.

4 Co. 26. b.

Cro. El. 662.

4 Co. 26. a.
Cro. El. 461.

[213]

The lessee of a copyhold for a year shall maintain an *ejectione firmæ* (*x*) ; for the common law warrants his term, and therefore gives him remedy in case he be ousted. So if the lord gives licence to make a lease, the lessee shall have an ejectionment.

Cro. El. 483,
224.
1 Leo. 328.

There is the case of *Stephens* and *Eliot*, where it was held, the lessee of a copyholder

(*w*) [See N. XC.] (*x*) [See N. XCI.]

could

could not maintain ejectment at common law ; and this is generally so ; but then this must be understood of a lease without licence, and for more than a year ; for by the licence, the lord gives up his power of adjudging about the lessee's estate, because when he hath given licence, it seems he hath an estate at common law, though of copyhold lands. It is held also, in some cases, that if a lease be made without licence, the lessee may maintain ejectment at common law (y), for the lease is a good lease against any body but the lord. If a copyholder may by custom make a lease, such a lessee may by common law have *ejectione firmæ*, making mention in his count, of the custom, yet this must come on the other side, by some. In this diversity of opinion, it will be good to see what is plain, that so we may more easily determine and know what is uncertain. And first, it seems plain that a lessee for a year of copyhold land, may have an *ejectione firmæ* : And it is very plain also, that where a copyholder may make a lease by custom, such lessee may have ejectment. But the question is, Whether such lessee need mention the custom in his count (z) ? It seems also to be plain, that lessee by licence may maintain the action for the reason before. But the main doubt of the case is, Whether a lessee, without licence, may maintain ejectment upon that

Cro. El. 535,
623, 676.
Mo. 569, 539,
679, and 271,
cont.
Cro. El. 469,
717, 728.
1 Leo. 100, 16.

[214]

Mo. 272. cent.

(y) [See N. XCII.]

(z) [See the last note.]

Owen 17.
Cro. El. 535.

Cro. El. 461,
623, 676.
Mo. 539.

reason that the lease is good against every body but the lord. And first, there is the case of *Goodwin ver. Longhurst*, where it was held, by all the judges, that such a lessee might; but the case itself was upon a lease that was licensed. And it is said, in the case of *Haddon ver. Arrowsmith*, that such a lessee may have ejectment. In the case of *Collins ver. Harding*, it is said, that *ejectione firmæ* lies of copyhold lands; but it is not said upon what lease. In the case of *Spark*, it is said by *Popham*, that it lies in such case: In the case of *Stopper ver. Gibson*, it is adjudged, that the lessee of a copyholder shall maintain an *ejectione firmæ*; but it is not said, whether upon a lease for a year by custom, or licence; so that here is no case when this was the point of the case, and but one case where the judges were of that opinion.

Cro. El. 394,
483, 524.

[215]

Mo. 679.
2 Brownl. 10,
40.
1 Inst. 57. a.

On the other side there is the case of *Stephens and Eliot*, where it was held *per cur.* that a copyholder could not have ejectment; and it is said so in *Laughter's* case, and in *Harrison's* case, that ejectment lies not of it, unless the plaintiff declare on the custom; and all those cases that are for declaring upon the custom are against it. And this opinion is supported by these reasons, that when a copyholder makes a lease, he determines his will, therefore may the lord enter (a);

(a) [See *ante*, 213. N. XCII.]

and if the lessee enter, he is a disseisor (*b*). And my lord *Coke*'s saying, that a lessee for a year may have ejectment, excludes others from having it.

A customary manor may be held by copy of court-roll (*c*), *ad voluntat. &c.* and such a lord may grant copies; but it seems it must be of such things as have been usually demised by him; for it seems he cannot grant all his demesnes by copy, without they have been usually demised (*d*): For though they have been demised time out of mind by the superior lord by copy, that will not warrant his demise by copy; because the custom must be, that time out of mind they have been granted *per Dominum Manerii*; now they have not been granted by him that is lord of the manor, though they have by the superior lord. This case seems to prove that a customary manor to hold courts, *&c.* may be without any freehold services (*e*); and it may as well be objected against such a lord's holding courts, that he hath no manor, because no freehold services; but it seems he may have freehold services.

1 Bullst. 57.
11 Co. 18.
Cro. Ja. 260.
cont. 327.
Yelv. 190. cont.
These cases are
thus reconciled,
that a customary
court may be
held by one that
hath such a ma-
nor, but not a
court-baron.

[216]

A copyholder may surrender by attorney in full court (*f*); for of common right a copyholder

(*b*) [See *post*. 231, 2. 319. (*y*), *contra*.]

(*c*) [Mr. *Hargrave*, (n. (2) to *Co. Litt.* 58. b.) observes That "this is denied in *Cro. Jac.* 268. and is a point which has been much controverted:" and refers to *Vin. Copyh.* (E), and *Com. Dig. Copyh.* (C. 1).]

(*d*) [See *ante*, 212. N. XC.]

(*e*) [See *ante*, 210. N. LXXXVIII.]

(*f*) [See N. XCIII.]

may surrender in court, which is common law ; as he may make a lease for a year without licence ; and as an incident to this power, the law allows him to do it by attorney ; and a copyholder may be admitted by letter of attorney ; but this is not of common right ; for every copyholder is to do fealty (*g*), which the attorney cannot do for him ; therefore the lord may refuse to admit by attorney (*g*) ; but if he do admit him, it is a good admittance. But where there is a custom for a copyholder to surrender by the hands of two customary tenants into the lord's hands, there he cannot surrender by attorney into the lord's hands by the hands of two customary tenants ; for such a surrender is warranted only by the custom ; and therefore unless there be a custom also to do it by attorney, the common law cannot give that as an incident, for it allows of no such surrender.

4 Co. 26, 27.

[217]

Ld. Raym. 92.
Ib. 76.

The lord himself may make admittances or grants at any place out of the manor, for he is not confined any more than any other person, to grant an estate at will where he pleases ; but there being only custom which enables the steward to make such admittances or grants, that which he does he must do upon the manor, unless there be a custom to keep a court out of

(*g*) [See *post*. 252, 285. And it is now become usual to respite fealty. And see *Harg.* n. (5) to *Co. Litt.* 68. *a.* and n. (5) to 68. *b.*]

the manor, which will enable him as well as the custom to do it upon the manor.

It is said, that a steward may grant copies as Cro. El. 103.
well out of court as in ; *sed quære (b) ?*

Feme copyholder for life takes husband who Ld. Raym. 159.
doth waste, this is a forfeiture of the woman's
estate ; but if a stranger do it without the assent 4 Co. 27. a.
of the husband, it is no forfeiture.

If a copyholder be seised, by force of several 4 Co. 27. a.
copies, of several parcels, by several tenures, if
he commit a forfeiture in one, it is no forfeiture
of the rest : As if he commit waste in part of
black acre, it is a forfeiture of all that acre ; and
by the same reason, if waste be committed in
one acre, it is a forfeiture of twenty acres, if
held by one tenure ; for the condition in law
annexed to the whole estate is broken ; and so
the lord may enter for the forfeiture : But where
there are several tenures, though they be in the
hands of one copyholder, there are several con-
ditions in law annexed to the several parcels,
and therefore the breach of the one is not so of [218]
the other. If such a copyholder surrenders to
the use of another, and the lord admits him by
one copy, *tenend. per antiqua servitia*, the several
tenures remain ; but if the admittance were
by one tenure, then it seems a forfeiture of part
would reach the whole, because the condition in
law is but one. So if several copyholds escheat

(b) [See *post*. 251.]

to the lord, and he grants them again *tenend. per antiqua servitia* to A. and he commits a forfeiture in part, this extends not to the whole.

He that comes in by admittance upon another's surrender, is in by him that made the surrender, and shall suppose himself in the *Per* by him (*i*).

4 Co. 27, 28.

Where a copyholder hath several parcels of land by several tenures, the lord ought to assess and demand his fines severally (*k*); for the fine for one may be reasonable, for another unreasonable: And if such a copyholder surrenders to the use of another, and he is admitted *tenend. per antiqua servitia*, the fines must be severally assessed.

13 Co. 2.

Stra. 447.

[219]

No fine is due either upon a descent or surrender, till admittance, for that is the cause of the fine (*l*); and therefore if after that the tenant deny to pay, it is a forfeiture (*m*); but if the fine be uncertain, the tenant is not bound to pay it presently, because he could not tell what it would be; but he must pay it in a convenient time, or else the lord may appoint a day for him

(*i*) [See N. XCIV.]

(*k*) [See *Dougl.* 722. *Grant v. Aisle*; and the case of *Serle v. Marth*, in *Fish. on Copyh.* Append. 280, 282. *acc.*]

(*l*) [And, consequently, in those cases where there is no necessity for admission, no fine can be due. See *ante*, 157. N. LXIX. and *post.* next page, and 289. 3 *Burr.* 1543. 2 *Durnf. and East*, 485. *Kitch.* 122. *a.*]

(*m*) [*Post.* 291, 2.]

to pay it on; but a fine certain he must pay presently upon admittance (*n*). *Note*; The lord ought to assess a certain time and place for payment of a fine uncertain; for the tenant cannot carry it always about him, and he ought to demand it. Hob. 135.

When the fine is uncertain, it ought to be reasonable, or else it is no forfeiture if the tenant do not pay it. As this case is reported by *Croke*, it is said, when a fine is certain, the heir ought to tender it upon his prayer to be admitted (*o*). As it is reported by *Coke*, it is said no fine is due until admittance (*o*), and that admittance is the cause; and as *Croke* reports it, so has *Moor*, 623, and if he do not pay it, it is a forfeiture. This seems to contradict what he said before; for if it cannot be a forfeiture until admittance, the demand of the fine must be of the person of the tenant to make a forfeiture. So of rent. Cro. El. 779.
Stra. 1042.
13 Co. 3.
Two years rent upon a surrender held unreasonable.

Hob. 135.
4 Co. 29. b.

When a surrender is made to the use of one, without expressing what estate the *cestuy que use* shall have, he shall only have an estate for life (*p*), except there be a particular custom to the contrary; as if there be a custom that he that hath

(*n*) [See *Moore*, 622. ca. 851. 4 Co. 27. b. &c. *Cro. Eliz.* 779. and *post.* 227. (*n*).]

(*o*) [The lord cannot refuse admittance till the fine be paid: He must first admit, and then demand his fine. See 1 *Roll. Abr.* 506. *Copyb.* (A); and 2 *Durnf. and East*, 485. and *ante*, 218. (*l*).]

(*p*) [See *ante*, 3. and N. VIII. *post.* 254. (*b*). 258.]

an estate *sibi & suis*, he shall have fee ; this custom is good, and so of the like. The limitation of the estate is always added to the use, not to the surrender into the lord's hands ; for a surrender of the estate gives up all the copyholder hath to the lord (q). Put the case then, that the surrender was made to the lord for life, to the use of another for life, what estate would the lord then have, and what could he make over ? Or *quære*, Whether the words *for life* would be of any significancy, though he that is admitted be in by the surrenderor ? Yet may a man surrender to the use of his wife, for she takes the estate from the lord, as an instrument to convey the estate to her (r) ; and so it comes not within the reason of other cases, that they being but one person cannot contract ; for he gives the estate to the lord, and he admits the feme to it.

If one surrenders, and dies, if the surrender be presented according to the custom, it is good ; otherwise void (s). So if the customary tenants, by whose hands the surrender was, die, yet if the surrender be presented upon good proof, it is sufficient (t).

(q) [See *Co. Litt.* 59. b. and n. (2), *ante*, 155. N. and 157. N. LXIX.]

(r) [See N. XCIV*.]

(s) [See N. XCV.]

(t) [If they remain alive, the surrender should, regularly, be presented by those who took it. See *Co. Copyh.* s. 40, and *post.* 279, 280.]

If he, to whose use the surrender was, die before admittance, yet his heir shall be admitted (*u*); for upon admittance the estate is in the *cestuy que* [221]
use from the surrender by relation (*w*). 2 Sid. 38, 61.

Where grants have been made by copy for life, a grant *durante viduitate* is good, but not *vice versa*. 4 Co. 25. a.
29. b.
Dyer 4. Co. 30.

A steward is a good steward to all intents and purposes, that is retained by parol (*x*) either to take surrenders, or make admittances upon voluntary grants : But the lord may discharge such steward when he will, that is, if he retain him generally ; yet a retainer generally by patent seems to be for life. The king's auditor or receiver hath no power by parol to retain a steward to hold the king's courts ; but he ought to have letters patent of the stewardship of the

(*u*) [See *post*. 288. *ante*, 218. N. XCIV. Case of Hale *v.* — Hil. 1655, C. P. cited by Holt, C. J. in Clements *v.* Scudamore, 2 *Ld. Raym.* 1025. 1 *P. Wms.* 65. and *Salk.* 243. *Robins. Gavelk.* b. 1. c. 6. p. 98. *Com. Dig.* Boro. Engl. 4 *Co.* 29. *b. Viner, Copyh.* (B. c), p. 191. and next note, *acc.*]

(*w*) [See the case of Vaughan *d.* Atkins *v.* Atkins, 5 *Burr.* 2764. *Ante*, 218. N. XCIV. *Post*. 288, 9. and the books referred to in the preceding note.]

(*x*) [*Co. Copyh.* f. 46. *Co. Litt.* 61. *b. Dyer*, 248. *a.* pl. 79. 4 *Co.* 30. *b.*

And such steward, retained by parol only, may take a surrender as well out of court as in ; so he may take the examination of a feme covert, &c. without alleging a special custom ; and that though the surrender be to his own use. See *Cro. Jac.* 526. *Cro. Eliz.* 717. *Harg. n.* (6) to *Co. Litt.* 59. *a.*]

manor

manor to make voluntary grants. The king's steward *ex officio* may make voluntary grants (y), much more may the steward of a common person (z), if he do not diminish the ancient rent (a).

Cro. El. 699.
4 Co. 30.
Mo. 410.
Cro. El. 426.
4 Co. 31.

Stra. 786.

[222] The case of *Shaw ver. Thomson*, as it is reported by lord *Coke*, is an authority that debt lies not in the king's courts for damages (b) above 40s. but the remedy was in chancery, or in the court of the manor; as it is reported, [by *Moore*] it is adjudged, that debt doth lie in the king's courts, because the court-baron doth not hold plea of things above 40s. As it is reported by *Cro.* the question was, Whether the damages were well assessed to 50*l.* when the court-baron cannot hold plea of above 40s.? and it was held they were.

4 Co. 31.

Underwood may be granted by copy or any other thing, parcel of the manor; as a fair appendant to the manor.

(y) [See 4 Co. 30. *Harris and Jay, acc.*]

(z) [See *Moore*, 112. ca. 252. *Cro. Eliz.* 699.

Though he be steward by parol only. See *Moore, ubi sup.*

So his deputy may grant. *Ibid.*

Or his deputy's substitute. 1 *Leon.* 288. ca. 394; and see 1 *Lord Raym.* 658. *Com. Rep.* 84. But a steward cannot grant in opposition to the command of his lord. *Cro. Eliz.* 699. and *post.* 315. (p).]

(a) [For if he does, it will be void. *Cro. Eliz.* 699, 700. *ante.* 198.]

(b) [— recovered in the court of the manor.]

Custom

Custom for one copyholder to have common, &c. in his lord's soil, is good ; for all the other copyholders may have forfeited their estates or interest therein.

If copyholds come into the lord's hands, if he ^{4 Co. 31.} make a lease of them for life or years, by deed or without deed, the copyhold is destroyed (c), ^{Carthew 428.} because during those estates it was not demised or demisable by copy. So if he make a feoff- ^{3 Leo. 108.} ment in fee upon condition, and enter for the condition broken, yet it is not grantable by copy ; but if he keep them in his hands never so long, or grant them at will, they may regrant them again by copy ; so if the interruption be tortious, as if the lord be disseised, and the disseisor dies seised, and after the lord's estate is recontinued, the lord may grant by copy ; so it seems if the disseisor had made a feoffment in fee. But if they be extended in the lord's hands, or his wife be endowed, though the interruptions be by act in law, yet they shall never be granted again.

(c) [For the lands are immediately enfranchised and become of a more honourable nature. See *Carth. 428. 2 Co. 17. a.*

Copyholds are, in the eye of the law, but estates at will ; and shall, therefore, be merged by the grant of the freehold. See 3 *P. Wms. 9. Dunn v. Green.*

See further of the Extinguishment of Copyholds, *Comm. Dig. Copyh. (B. 3) and (L) ; Viner, Copyh. (F. b) ; Fisher on Copyh. c. 13. Lex Cust. c. 23. Co. Copyh. f. 62.]*

2 Co. 17. a.

Cro. Car. 521.

1 Keb. 720.

4 Co. 126. b.

Hob. 215, 181.

Cro. Ja. 573.

If the copyholder accept a lease for years from the lord, the copyhold is for ever gone (*d*); and by the same reason a release upon that lease will pass the freehold and inheritance to him: But if a lease be made of the manor, and of a copyhold tenement by express name, yet this will not extinguish the copyhold (*e*).

If the copyholder takes a lease for years of the manor, his copyhold hath no continuance, but he may grant it by copy to another (*f*): If after the copyhold comes to the lord's hands, he aliens the manor by fine, &c. the alienee may regrant it (*f*).

Ut supra.

The lord shall not have the custody of lunatick persons lands, unless there be a custom for it (*g*); neither shall the king have it, for the prejudice that would ensue to the lord (*g*).

Hutton 18.

1 Rol. Ab. 502.

Noy, 29.

In case of a widow's estate, it is said to be solved and agreed in *Lex Cust.* 156. that no fine is due. *Quære* of this? for though the estate

(*d*) If copyhold lands be in the hands of a subject, who is after preferred to dignity royal, the copyhold is extinct; for it is below the majesty of a king to perform servile services. And yet after his decease, the next who hath right shall be admitted, and the tenure shall be revived in him. 2 *Siderfin* 82.

(*e*) [See N. XCVI.]

(*f*) [4 Co. 31. b. acc. And see 1 *Roll. Abr.* 498. *Copyh.* (B) and *Com. Dig. Copyh.* (B. 3).]

(*g*) [See *Hob.* 215. *Cro. Jac.* 105. ca. 43. *Dyer* 303. a. pl. 46. *Hutt.* 16, 17. 4 Co. 126. b. *Ante*, 186. *Post.* 307, 8.]

be

be adjudged in the woman, yet that is no argument she shall pay no fine, for the estate is in the heir by descent, and yet he shall pay a fine, and both are compellable to be admitted; and then why should they not pay a fine (*b*)? The like of dower and curtesy.

A copyholder had common in his lord's waste; the lord grants and confirms the copyhold land to him and his heirs, *cum pertinentiis*; adjudged the common was extinct, being annexed to his customary estate, by the custom, which estate being determined, the common also is, and cannot continue without words to that intent, and *cum pertinent*. will not do; for the common was not appurtenant to the freehold estate granted by the lord; therefore care ought to be taken in infranchising copyhold estates, to add words to continue common and other profits *apprendre* to the copyholder after the infranchisement (*i*).

Hob. 190.
Cro. Ja. 253.
Yelv. 189.
Noy 136.
2 Rol. Abr. 61.
2 Brownl. 210.
Mo. 667.
Cro. El. 794.
2 Vernon 250.

Post. Carter's
Rep. 6, 7, 22.
1 Vernon 393.

In this case is cited the case of *Ford ver. Ward*, where the lord granted to his copyholder the freehold of his copyhold, by the words of (Grant unto him all the lands, tenements and hereditaments thereto appertaining, and thereto used and occupied); and it was held he lost his copyhold (*k*); the reason seems to be, because

Cro. Ja. 253.

(*b*) [See N. XCVII.] (*i*) [See N. XCVIII.]

(*k*) ["His copyhold:"—Perhaps it should have been "his common:" as in that case it was adjudged that, as the copyhold was extinguished on the conveyance of the freehold, the common was, in consequence, lost; the estate thus ceasing to which it was annexed. See the case of *Marshall v. Hunter*, Cro. Jac. 253.]

the

Mo. 667.

the common was nothing appertaining, &c. to the freehold he granted : But as this case is reported by *Moore*, no other words are put in (1) all commons, &c. appertaining to the said messuage ; and there another reason is added, *viz.* now he claims by the lord who cannot have common in his own ground. But this is a reason only where the common is in the lord's soil ; but the other holds where it is in another's soil, which is a much stronger case ; for as it seems in such case there is no way to continue the common : For by the grant of the freehold it is gone, and the lord can make no new grant of it, but in his soil he may.

1 Brownl. 173.
2 And. 168.

Co. Cop. 16a.
not law.

Stra. 447.

My lord *Coke*, in his Treatise of Copyholds, saith, that if the lord demand his rent of the copyholder, and he saith that he wants money, and intreats the lord to forbear until he be provided ; that this is a forfeiture. And that if the lord make a continual demand upon the land, and the copyholder is not there, this is a forfeiture ; but if he demand once, and nobody is there, this is no forfeiture. Now as in other respects, so in this, copyhold customs are not to be expounded by the strict rules of law, which appears from what *Coke* says, who owns that if the copyholder be not there upon the land, it is no forfeiture ; yet in case of a condition for re-entry,

(1) [" In all commons:" It should have been " than all commons. See *Moore*, 667. pl. 915.]

that had been a forfeiture to entitle the feoffor to an entry. But the condition annexed to copyhold estates, is a condition in law; for the estates of copyholders are but an estate at will, and yet the law makes an inheritance of it, and puts it out of the power of the lord to determine their estates, so long as they do their services. But when they fail doing this, the law no longer protects their estates, but suffers the lord to enter; but then this refusal to do their services must be wilful, as it seems, which will amount to a determination of the will of the copyholder, and not any other refusal, if he signifies his design to pay, and so to continue his will; and therefore the case above, where the copyholder intreated the lord to forbear, is not law (*m*). To prove which, there is the case of *Crisp* and *Fryar*, where that was held no forfeiture; but the case itself was upon a demand upon the land for three years rent, no body being there, whether it were a forfeiture or no? and as the case is reported by *Croke*, one judge was of opinion it was no forfeiture, because it was only a denial in law; and that the condition in law was not annexed to the non-payment, but to the wilful refusal: But two other judges held it to be a forfeiture, and that a denial in law is a forfeiture, as well as a denial in deed; *sed adjournatur*; and no more of it is said in that book. But the case is also reported in *Moor*; Moor 623.
1 Roll. Abr.
506. Cro. El. 505. [227]

(*m*) [See N. XCIX.]

and there it is said to be held a forfeiture by the same two judges; but the reason given was, because so long a non-payment amounted to a wilful refusal.

My lord *Coke* says, that a demand upon the land is no forfeiture, if the tenant be not there, unless it be a continued demand: And there is the case in *Hobart*, where it was adjudged, that a demand for rent or fine must be of the person of the copyholder (n), which proves that a denial in law will not make a forfeiture. The case was, the lord assessed a fine of twenty nobles upon his copyholder, and appointed him to pay it to his bailiff at his house within the manor, three months after; and the fine being not paid at the time appointed, he entered without any demand.

Nich. 135.
Moor 623.
Cro. Jac. 617.
200.
4 Co. 27, 28.

Latch. 122.

[228] The case of *Williams* was this; the lord demanded the rent of the copyholder; he answered, he had it not with him then, but that he would pay it as soon as he could; the lord said, pay it at my house at such a day, which house was within the manor. Adjudged, first, that the copyholder's words (though a denial in law) was no forfeiture, but his non-payment at the day assigned was a forfeiture, because it amounted to a wilful denial, for he promised to pay it, and failed; but had the place assigned been out of the manor, it had been no forfeiture. This case

(n) [See *ante*, 219.]

is apparently different from that next preceding; for here was a demand of the copyholder, himself; there was no demand at all. There is Lit. Rep. 262. the case of *Casson and Uthbert*, where a widow had copyhold lands, and divers persons came for the rent, whom she put off with delays; at last comes a young gentleman and demands it; she answered that she did not know him, but if he would dance before her, if she liked his dancing, she would pay him; this denial was adjudged no forfeiture, not being wilful.

If the estate of the lord cease by limitation of 3 Co. 92. use, and the use and estate of the manor are transferred to another, who demands the rent, and the copyholder denies to pay it; no forfeiture, without notice to him of the change of the use and estate. The like law of a bargain and sale of a manor inrolled, &c.

It seems the law is the same concerning lease and release; but if the manor be in possession of the lord himself, and not in the hands of any lessee, and he makes a lease, and then releases, the lessee having possession; *quare*, if the copyholder denies paying, if this is not a forfeiture, because the entry of the lessee is notice as much as livery, &c.?

Non-appearance at court after summons is a forfeiture of the copyhold; but without warning it is no forfeiture, but only negligence; and after summons it is a forfeiture, without an express refusal, as in case of rent: For the conse-

Moor 350.
3 Bull. 26.
1 K. M. Rep.
256, 429.
Noy 5.
Cro. El 503.

quence is more fatal in this case, because without the copyholder's attendance there can be no court.

2 Leo. 104.

It is held *per tot. cur.* in Sir *J. Braunche's* case, that a general warning within the parish is sufficient; so that if the copyholder doth not come, let him live where he will, it is a forfeiture, because his tenant may send him word: It was there likewise held, that sickness, or a great office, may excuse the copyholder's attendance, and that services could not be done by attorney (o), but an attorney may essoin. But as to the point of general warning, four days notice had been adjudged sufficient time; and how can a copyholder be summoned in that time that lives 200 miles off? therefore it was held in the case of *Taverner ver. Cromwel*, that general notice is not sufficient, but a personal summons (p): The like in *Griff* and *Fryar's* case. This opinion seems most reasonable. If a copyholder be in debt, and is afraid of being arrested, or is a bankrupt, and keeps house, these are good excuses. *Vide 3 Leo. 107.*

Cro. El. 353,
505, 506.

[230]

Co. Cop. 159.

■ The lord comes to the copyholder, and requires him to do his services, and the copyholder answers, if they are due, he will do them, but it shall be tried at law first, whether they are due by law; this is no forfeiture, being no wilful

Latch. 122.
Style 141.

(o) [*Supplement to Co. Copyh. f. 18. and ante, 184. (z).*]

(p) [*Fisher on Copyh. 93. acc.*]

refusal.

refusal. If the copyholder say, if it be a court, he will appear at it, if not he will not, this is no forfeiture; but if there were no controversies about the court, but that is only used as a shift, then it seems it is a forfeiture.

If a copyholder refuse to be admitted, it is a forfeiture. If a copyholder come not to be admitted where the custom of the manor is that every heir shall come to court to be admitted; and if he do not, proclamations shall be made for him to come in; and so in the two next courts, or else that the lord shall seise; this is a forfeiture, for the custom is a good custom (*q*), being only to compel the tenant to come in and be admitted. But [otherwise] if the heir be beyond sea at the time of the descent, or within age, *non compos*, or in prison. But it seems such custom would bind a feme covert (*r*), being like to the case of fines at common law; in which case they only were not bound who could not make claim; but a feme covert having a husband, may claim by him, and therefore she was bound. But if such heir be within *England*, at the time of the first proclamation passed (*s*), and then go beyond sea, he shall forfeit; for he

Style 387.
8 Co. 100.
Cro. Jac. 108.
1 Leo. 100.
4 Leo. 30, 31.

[231]

(*q*) [See N. C.]

(*r*) [The copyhold estates of femes covert are preserved from forfeiture in these cases, and the manner of their admission, and the lord's remedy for his fines, prescribed and regulated by the *stat. 9 Geo. c. 29.*]

(*s*) [See 8 Co. 100. *b.*]

had warning, and ought to have come in, and not have disabled himself from making claim. But if he had gone beyond sea, after the descent (*x*), and before the first proclamation, this had been no forfeiture; for at the time of the court he is to make claim; *sed quære*. It was said by *Williams*, that because the lord cannot have any services done him in the mean time, that the lord may seize the lands and take the mean profits, and shall not be answerable for them. *Sed quære* (*u*).

Cro. Jac. 101.
226.

Dyer 211. 6.
Noy 92.
Cro. El. 535.
676.

[232]

If a jury or homage refuse to present the articles, according to their oath, this is a forfeiture of their copyholds, for the prejudice thereby ensuing. If the copyholder make a lease (*w*), it is a forfeiture, yet it is no disseisin to the lord (*x*), which is plain from the cases that say such a lease is good against every body but the lord; for it could not be a lease at all, if it were a disseisin. It is a forfeiture, because the copyholder has broke the custom of the manor, by bringing in a tenant without any admittance; but it is no disseisin in favour of the lord, since the copyholder hath such estate

(*x*) [See N. CI.]

(*u*) [See *Carth.* 41—5. 3 *Durnf. & East*, 162. and *post.* 308. N. CLXI.]

(*w*) [*i. e.* A lease not warranted by custom. See *ante* 212, &c.]

(*x*) [See *post.* 309. (*x*).]

as may last much longer than the lease, and not a bare lease at will.

A lease that will make a copyholder forfeit ^{1 Bullf. 129,} his estate, ought to have a certain beginning and end, or else it is a void lease, and can convey at most but an estate at will, which is no forfeiture. A copyholder for life makes a lease for a year, and then makes a lease to the ^{Jones 249.} same party for another year, to commence one ^{1 Rol. Abr. 510.} day after the first year, and then surrenders his ^{1 Bullf. 215.} copyhold to the lord; it was adjudged the second lease was a forfeiture; for it is not warranted by custom, and so being out of the custom, it is, as every other lease for years, a forfeiture; for though it be not to commence till after the first lease ended, yet the land is charged with a double interest, one *in præfenti*, the other *in futuro*; which is against the custom, and so a forfeiture (y). Secondly, It was adjudged this lease was void against the lord, who had the land by the surrender, and when the lord enters by force of the surrender, he is in ^{1 Rol. Abr. 500.} by title *paramount* the lease. But it seems the ^[233] first lessee shall enjoy his lease, or else it were in the power of the lord to defeat his own grant. There is nothing said of this; but the case in *Rolle* is, That the leases were executed at one ^{1 Roll. Abr. 509.} and the same time; and then the lessee, being

(y) [See 1 *Roll. Abr.* 507, 8. *Copyh. (D)*, pl. 8, &c. and *post* 234.]

particeps criminis, may perhaps forfeit; and as the case is reported by the rest, the lease was made to him to commence in reversion; and so he is as much party to the wrong as in the other way; and so it seems the lord may enter presently. - The same point of a lease for a year except a day, adjudged a forfeiture.

Cro. Jac. 308.

Cro. Jac. 301.

A. makes a lease of his copyhold to one for a year, and then covenants the lessee shall enjoy it *de anno in annum*. No forfeiture, only a covenant and not a lease. *Quare*, and see the book; for the words *Covenant and Grant* make a lease, &c. But in another case it was held,

Cro. Car. 207.
Cro. Jac. 92.

that these words by construction might make a lease, where the lands might be let; but otherwise where the lands could not be let; which distinction seems very reasonable; for the words themselves do not import a lease; and it would be a very injurious construction to make them a lease, and so a forfeiture, when they only import of themselves a covenant (x).

[234]
2 Keb. 267.

Cro. El. 499-

351.
1 Roll. Abr. 608.
Moor 392.

A lease for years by parol, to commence *in futuro*, is a forfeiture, because of the unlawful contract made to the lord's disherison.

Moor 184.

The lord gives licence to his copyholder to make a lease for twenty-one years, to begin

(x) [Mr. *Hargrave* remarks that " though in general a covenant amounts to a lease, yet it seems harsh to give such a construction where a lease amounts to a forfeiture, and the intention of the parties may have effect by way of agreement." N. (4) to *Co. Litt.* 59. a.]

next

next *Michaelmas*; the copyholder makes a lease accordingly; but before *Michaelmas* makes another lease by indenture to another for twenty-one years to begin at *Michaelmas* next; it was held by *Anderfon* that this was a forfeiture; *sed quære*; for the lease was void in point of interest, and only worked by way of estoppel betwixt the parties; and if no interest passed, how could it be a forfeiture? yet had the first lease been surrendered, the second lease would have taken effect, and then the land had been charged with a lease without licence; but till that happened, the land was charged with nothing in point of interest. And this is not like the case of a future lease; for there the land is bound presently; and though this may happen to be a charge, yet the supposition is foreign, and ought not to be intended to work a forfeiture. If a man make a deed of feoffment of his copyhold, or a demise for life, without livery, no forfeiture, because without livery nothing passes (*a*); but by a lease for years an interest passes by the delivery of the deed, and therefore that is a forfeiture (*a*).

[235]

1 Inst. 59. 2.

My lord *Coke* says, if tenant for life of a copyhold suffer a recovery by plaint in the lord's court, as a copyholder of inheritance, this is a forfeiture, but *Lex Cust.* page 206. says it was

Co. Cop. 163.
Mod. 199.

(a) [See *Co. Copyb.* f. 58.; *Com. Dig. Copyb.* (M. 2); *Finer, Copyb.* (G. c) & (I. c); and *post.* 255. N. CXVIII. 338. N. CLXXXIX.]

otherwise

otherwise adjudged in the case of *Bird* and *Keck*. *Ideo quære* (b). If a copyholder erect a new house upon the land without licence, it is no forfeiture (c), because it is for the melioration of the state of the land; but then it seems this house must be subject to all the customs of copyhold land; therefore if he pull it down again, it is a forfeiture.

1 Roll. Abr. 507.

1 Bulst. 50.

1 Inst. 63. a.

1 Roll. Abr. 508.

Mo. 49. cont.

Co. Cop. 163.

Waste, either voluntary or permissive, is a forfeiture of copyhold lands, unless there be a custom to cut trees, &c. It seems if a stranger doth waste in the copyhold lands, it is no forfeiture, because not the copyholder's act (d). My lord *Coke*, in numbering permissive waste, doth not reckon the waste done by a stranger. And further it is resolved in *Clifton's* case, that if the

2 Roll's Rep.
372.

(b) [See N. CII.]

(c) [1 Roll. Abr. 507. *Copyh.* (D), pl. 6. acc.]

But see *Dyer*, 321. pl. 31. in marg. *Hutt.* 103. 4 *Leon.* 241. Ca. 383. *contra*.—"As it altereth the nature of the thing, and putteth the lord to more charge."

See also *Co. Litt.* 53. a. That if a lessee for years of freehold lands build a new house on the premises, it is waste. Though 1 Roll. Abr. 815. *Waste*, pl. 22. is *contra*.]

(d) [1 Roll. Abr. 508. *Copyh.* (D), pl. 17. 4 Co. 27. a. (See it.) 4 *Leon.* 241. Ca. 381. acc. and see n. (2) to *Co. Litt.* 63. a.]

But *Moore*, 49. pl. 149. is *contra*. And Chief Baron *Cormyns* says that it was resolved *contra*, and agreed to be settled, in *Lutw.* 807. *Dig. Copyh.* (M. 3). And see 1 *Vesf.* 462. *Rook v. Warth*, where Lord *Hardwick* seemed to consider the copyholder as answerable for waste in all cases, except it were occasioned by the act of God.]

husband commit waste in lands of his wife's, it is a forfeiture; but if a stranger commit waste, 4 Co. 27. a. it is no forfeiture; and it seems every forfeiture ought to be the wilful act of the copyholder, so [236] as it may amount to a determination of his will.

Turning plowed land to hop ground or a piscary is a forfeiture. It is said to be resolved in my lord *Montague's* case, that a copyholder by common law, cannot take house-bote, &c. but must have a special custom to warrant it. There is the case of *East* and *Harding*, as reported by *Croke*, that a copyholder cut down timber-trees, and let them lie five years, and after the action brought employed one of them; but the jury found he cut down the trees for the reparation of his house; and even in this case two judges were of opinion that it was no forfeiture, being cut down to repair; and yet in the putting this case, there is no custom said to be found for the cutting down timber for reparation. But *Moor*, in arguing, says, that it was found so. Here the trees were not employed in five years, and then but one employed, and that too after the action brought. *Moor*, in reporting this case in the former part, says, the copyholder cut down two trees, no custom being found one way or other, for the cutting to be a forfeiture or punishable. And then a little further he saith, that the jury found the custom for cutting trees for reparation; and then afterwards he says, that it was resolved, Doing of reparations as it

Lit. Rep. 267,
268.
Cro. El. 5.
13 Co. 68. cont.
Cro. El. 498.
1 Roll. Abr. 302

Moor 392a

[237]

is

is found, though it be five years after the cutting, and after entry for the forfeiture, and action brought, is a dispensation for the forfeiture. The opinion of *Popham* was, that a copyholder may cut timber for reparation, without custom. It was adjudged between *Dawbridge* and *Cocks*, that a copyholder may lop off the under-boughs without a special custom, but not the top-boughs, because that would cause a putrefaction in the timber. It seems reasonable that a copyholder should have timber to repair, &c. *sed quære* (e). In *Swain's* case a custom was found to take house-bote, fire-bote, &c. Custom that every copyhold tenant may cut down trees at their will and pleasure is unreasonable and void; for then a tenant at will might do it. So it is for a copyholder for life to do it; and one of the reasons given is, that the succeeding copyholder would not have wherewithal to maintain the house and the plough, which plainly intimates that a copyholder may cut timber to make reparations; and the rather, because permissive waste is a forfeiture in him. If there is a copyholder for life, who by custom may name his successor

Cro. El. 292.
1 Roll. 508.
Cro. El. 361.

3 Co. 64.
Winch 1.
Cro. Ja. 30.
Cro. Car. 220.
1 Bulst. 50.
Noy 2.
1 Roll. Abr.
650. 660.

(e) [The law seems to be that a copyholder may take the necessary estovers or botes on his copyhold *without* a special custom. 1 *Lord Raym.* 552. *Post.* 239, 40.

But to enable him to take them *on any other lands of his lord*, a special custom must be shewn. 4 *Co.* 31. b.]

for

for life, and so for that copyholder to name his successor, such a tenant for life cannot by custom cut timber*. But if he had been a copyholder of inheritance, such custom is good. And my lord *Coke* says, that if a copyholder do waste, it is a forfeiture, unless there be a custom to the contrary. If there be a custom for a copyholder to take timber for reparations, fuel, &c. such a custom is good, though the copyholder have but a particular estate, though he cannot do what he will with the timber. 3 Co. 64.

If the copyholder take the shrouds of trees by custom, if the lord takes the body, an action on the case lies against him (*f*), which seems to prove, that the lord may not cut down the trees upon the copyhold lands, which is very reasonable; for the copyholder hath a particular interest in them; and then if a copyholder of inheritance cannot cut them down by custom, the timber may stand and rot, and no body the better for it. Roll. Rep. 196.
26. cont.

Where a copyholder may take trees for reparation, the cops and tops belong to him, and though he cannot repair with them, he may sell them to help to defray the charges. Copyholder for life cuts down trees, the lord may take them. So it seems, if he be a copyholder 3 Bulst. 281.
Style 233.

* [See 1 *Roll. Abr.* 560. pl. 18. and 2 *Durnf. and East*, 746. *Mardiner v. Elliot*, *contra*.]

(*f*.) [See *post*. 239, 40. *N.* (4) to *Co. Litt.* 60. *b.* *Ld. Raym.* 551. *acc.*]

of inheritance, if there be no custom (g). Underlessee cuts down trees, it is no forfeiture of the copyholder's estate (h).

Mod. 94.

If the lord grants his trees growing upon the land, or which after will grow, he may cut the trees, now growing, by force of the grant; but as to those that are not grown, the grant is void.

Co. 3.

Two years value, for a fine for an admittance upon a surrender, was adjudged to be unreasonable (i); but where copyholds are only for life, and fall into the lord's hands, there the interest passes from the lord, and so *arbitrio domini res aestimari debet* (k); but in case of surrenders, the lord is only an instrument.

23 Co. 68.
2 Lea. 272.

The lord of the manor may cut down the timber-trees growing upon the copyhold lands, provided he leave sufficient for house-bote, &c. (l) This must be understood where there is no custom for the copyholder to cut timber-trees. Therefore the case before must be understood, when the lord cuts down the trees, there not being sufficient left for fuel; for though a custom be alleged for taking shrouds for fuel,

(g) [*i. e.* where he is not entitled to them as estovers; for the lord is, *prima facie*, entitled to the timber growing on the lands of his copyholders, save as to botes. See *Lord Raym.* 551. *Fisher on Copyh.* 98—100. 2 *Durnf. & East*, 746.]

(h) [See n. (2) to *Co. Litt.* 63. *a.* and *note*, 235. (d).]

(i) [See N. CIII.]

(k) [See N. CIV.]

(l) [See above n. (g).]

it is no more than the common law allows; and therefore if the lord cut down the trees without leaving sufficient for fuel for the copyholder to take shrouds of, an action upon the case lies against the lord. And my lord *Coke*, presently [240] after he had laid it down as a resolution that the lord may take the timber-trees, leaving sufficient for the copyholder for house-bote, &c. puts a case of an action upon the case brought ^{13 Co. 69.} by a copyholder against his lord, for cutting down pollingers, where, by the custom of the manor, every copyholder had the loppings of those trees for fuel. And this case is cited to prove that an action of trespass lies against the lord for cutting trees, not leaving sufficient, so that the case must be understood, where there was not sufficient besides; or else my lord *Coke* cites a case where it is resolved that the lord can cut down none, to prove that an action of trespass lies for cutting, and not leaving sufficient; which follows another resolution in the same case, that the lord may cut down timber-trees, leaving sufficient; and the custom to cut makes no alteration; for it is resolved in the same case, that every copyholder *de com. jure* may take trees for house-bote; so that the laying the custom seems to be only by way of caution.

Cro. El. 629.
Mod. 546. 355.

(m) It seems if a copyholder commit fe- ^{Strange 447.}

(m) *Revertitur terra ad dominum capitalem, vel ad rectum dominum, scilicet ad ipsum de cujus feodo est. Bracton, l. 3. fol. 130. [See Wright, 115. n. (g).]*

Ld. Raymond,
1000.

Co. Cop. 150.
164.

13 Co. 3.

1 Leo. 1.

[242]

lony or treason, he forfeits to the lord, without any particular custom; else a felon would have no punishment in his posterity, if he had copyholds of never so great value. *Coke*, in one place, says, if a copyholder commits felony or treason, he forfeits his copyhold presently; in another place he says, he forfeits upon presentment (*n*); and in a third place he says, the lands escheat to the lord. In none of these cases he mentions any custom, but speaks generally. It is a forfeiture presently before indictment or attainder, as it seems (*o*), because the custom will not, in favour of a felon, support an estate at will, but let the lord determine it, as in case of any other estate at will. The law will not give his estate to the king, because then the lord would lose his services (*p*); yet in *Packinton's* case, a custom is alleged for the lord to have the forfeiture of his tenant's copyhold land for felony; and there the custom was for the wife to have her free bench, and be admitted, during which time he that had the inheritance was attainted and died, and then the

(*n*) As to forfeitures of copyhold estates for treason or felony, *Vide T. Jones's Rep.* 189. 2 *Vent.* 38. 3 *Levinz.* 93. 2 *Vent.* 38. 1 *Lev.* 263. 1 *Lev.* 34. 1 *Bulst.* 13. 2 *Brown.* 217. *Godb.* 287. *Cro. Eliz.* 499.

(*o*). [See N. CV.]

(*p*) In *Packington's* case it was adjudged, that the lord might seize; because the custom was found for him to seize
1 *Leo.* 1.

wife

wife died; it was adjudged the inheritance was forfeited to the lord, notwithstanding he was not tenant (*q*): the custom was if any copyholder be convicted of felony (*q*). However, it seems conviction is not necessary (*r*); but if the thing will bear it, it is good to lay a custom. Co. Cop. 164.

(*r*) My lord *Coke* says (*t*), that if a copyholder be outlawed or excommunicated, upon presentment the lord shall have the profits of the lands. It is said in *Lex. Cust.* 210. that if a copyholder be outlawed in a personal action, it is no forfeiture of his copyhold, but the king shall have the profits; *quare* of this; for then how can the lord have his services paid him? *Quare*, If a copyholder forfeits any thing in outlawry, unless for a capital crime (*u*). If a man be convicted of manslaughter, and reads, he shall not forfeit. Inclosure of copyhold lands is no forfeiture (*w*). If the lord hath used to

Ut supra.
Ld. Raym. 154.
306, 307. 1000.

2 Keb. 451,
456.

(*q*) [See N. CVI.]

(*r*) [See the last page, N. CV.]

(*s*) If tenant at will be outlawed, his estate is determined; but a copyhold is not forfeited or determined by outlawry. *Lit. Rep.* 234.

A copyholder was outlawed, adjudged it is on forfeiture of his estate. 1 *Leon.* 99. *Heil.* 127. [*Post.* 328.]

(*t*) [See *Co. Copyh.* f. 58.]

(*u*) [See *Vin. Copyh.* (M. c), pl. 5. *Ante*, 185, and *post.* 328. 4 *Bl. Comm.* 319.]

(*w*) [Of Forfeiture on Enclosure, see *Hutt.* 102, 3. *Præ. in Chanc.* 568. *Sir H. Peachy v. Duke of Somerset*, 1 *Strange*, 447. S. C. *Fish. on Copyh.* 101. *Vin. Copyh.* (L. c).]

Hut. 102.
Lit. Rep. 246.

have a field-course over the lands of the copyholder, if he inclose them, and there hath been a custom to fine for such inclosure, it is no forfeiture; but if there hath been no custom to fine, it seems it is a forfeiture, because the lord hath no other remedy. Rescous and replevin are forfeitures of copyhold land, because they amount to wilful refusals (*x*). Defacing of land-marks is a forfeiture (*y*).

Cro. Car. 7.

Feme copyholder of inheritance takes husband, who makes a lease for years by deed indented, and dies; the feme may enter; or if she be dead, her heir may enter; because the forfeiture for which the lord might enter, continues no longer than the husband's life, and then she may avoid the lease; but if she does any thing that makes the lease to have continuance, it seems then the forfeiture remains; but if the husband doth waste, as in cutting trees, there the lord's inheritance being prejudiced, the forfeiture always remains. So if the husband denies to pay the rent, or to do suit; for the lord must have his services, and the feme hath no way to avoid those nonfeasances. It was said by one judge, that if the lands come to the feme after marriage, it is no forfeiture, because it cannot be said to be her fault to take such a husband as would not do the services. But it seems this distinction, for the reason

Ld. Raym.
1000.
4 Co. 27. a.
Cro. El. 149.
2 Rol. Abr. 509.

[244]

(*x*) [*Co. Copyh. f. 57.*]

(*y*) [*See last page, n. (w).*]

aforesaid, is of no use, and it is not mentioned in any book. Most of the judges of *England* were of opinion, that a lessee for years (z) might take advantage presently of a forfeiture though his lease were to commence in possession at a day to come. It is agreed on all hands, that lessee for years of a manor may take advantage of the forfeiture.

Cro. El. 499.
Mo. 393.
1 Rol. Abr. 509.

A copyholder makes a lease for years, the lord grants the freehold in fee or for years, no body can take advantage of the forfeiture; for the wrong was to the lord *pro tempore*, and he hath dispensed with it by making a grant.

Owen, 63.

Copyholder for life, the lord makes a lease to commence after the end, forfeiture, or determination of the estate for life; the copyholder commits a forfeiture; the lord will not enter; the lessee may. Copyholder for life, remainder to another in fee, the first copyholder commits a forfeit, he in the remainder shall not enter, but the lord shall hold it during the life of the first copyholder; for copyhold estates are not like those at common law; for in copyhold cases the remainder is to commence after the death of tenant for life, and not after his estate or interest is gone. But in such case the forfeiture of tenant for life would not prejudice the estate of him in remainder, unless there be an express custom for it. So if there be a

Rol. Abr. 852.

Ld. Raym.
1000.

9 Co. 107. a.
2 Leo. 73.

[245]

(z) [See further, *Vin. Copyh. (T. c.).*]

Cro. El. 879.

custom, that if upon a surrender made, the *cestuy que use* doth not come to be admitted before three proclamations pass, that he shall forfeit his estate. If in that manner a surrender be made to the use of *A.* for life, the remainder to *B.* in fee; and *A.* suffers three proclamations to pass, and *B.* makes no claim; yet shall not *B.* forfeit his remainder, for the custom shall be taken strictly; but the reason of the resolution of the case implies, that had the custom been laid to reach remainders too, it had been good, and the remainder had been forfeited in that case.

Cro. El. 598.

Then there is the case of *Rafal* and *Turner*, where tenant for life of a copyhold, the reversion to another in fee, contrives to sell the copyhold to another in fee, which is to be done in this manner: The tenant for life is to commit a forfeiture, and the lord is to seise, and grant it in fee by copy to the vendee; all which is accordingly done; it was adjudged, that the interest of the reversioner was no ways prejudiced by the forfeiture. These authorities are grounded upon the highest reasons; for else he that hath but a particular interest in copyholds, will have as good an interest as those that have a fee; for by secret covin he may commit a forfeiture, and so give away the fee. But notwithstanding these authorities grounded upon so good reasons, there is a case in *Moor*, where a copyhold to two for lives to have suc-

cessive,

Ld. Raym.
1000.

[246]

Mo. 49.

cessiva, and the first committed a forfeiture, and it was adjudged that thereby the remainder was forfeited (a).

It is held by my lord *Coke*, that a presentment is necessary to make a forfeiture in those cases where the lord cannot be presumed to have notice of himself, as if the tenant commit felony. But it is said *per Cur. alibi*, that presentment is not of necessity, but only for the lord's better instruction, and he may take notice himself if he will. And indeed the reason given by *Coke* is of no cogency, that because the lord cannot by intendment have notice of them himself, that therefore he shall take no advantage of them without presentment; for if he can take notice of them, why should he not, since presentment is not that which gives title, but only lets him know what he hath a title to? But however, it is safe to get such things presented; and if there be a custom for it, it must be pursued. Where the tenure is several, there the forfeiture of one part is not a forfeiture of all (b). It is said by my lord *Coke*, that if the tenure be one, that a feoffment of part is a forfeiture of the whole. But it is said in *Lex Custom.* that only so much is forfeited; but if waste be committed in part, that the whole by the same tenure is forfeit; for that goes to the destruction of the houses, and so of the whole

Co. Cop. 164.
Cro. El. 499.
Larch, 227.
3 Keb. 641.

4 Co. 27.
Cro. El. 353.
[247]

4 Co. 27. a.
3 Keb. 641.

(a) [Sec N. CVII.]

(b) [Sec ante, 218. (t).]

copyhold estates. But if there be no building, *quare*; for it seems unreasonable then, that waste in part should be a forfeiture of the whole; and so it seems in case of feoffment of part.

3 Roll. Ab. 509.

Copyholder by licence lets for years; the lessee makes a feoffment, he only forfeits his lease. It is said to be resolved in Chancery, that if the father commits a forfeiture, and dies, and the lord admits his heir (*c*), that this is no dispensation with the forfeiture, because the ancestor died seised of no estate, and so none could descend to the heir. This case seems to be unreasonable, for it seems that the ancestor died seised of an estate; for nothing removes the legal estate and interest out of him but the lord's seizure (*d*).

3 Keb. 341.

[248]

There is a distinction taken in *Kebble*, that where after the death of the tenant, the lord accepts a heriot-service, that is a dispensation with the forfeiture, but not where he accepts heriot-custom: This proves, that after the forfeiture the estate is in the tenant, else the lord could not have heriot. The reason for the difference seems to be, because in accepting of heriot-service, he admits the heir tenant; but in accepting heriot-custom, he only admits the tenant died

Vide Cro. Ca.
234. and 1 Keb.
15.

(*c*) [The lord in all cases must have notice of the forfeiture, otherwise it will not be a dispensation. See the next page. *Fish. on Copyb.* 108. and see also *Post.* 334. N. CLXXVII.]

(*d*) [See *ante*, 213. N. XCII.]

seised.

seised. *Sed quære*; for it seems to me to be a dispensation; for he admits him to be tenant after the forfeiture committed; and therefore if the lord accept of any services after he knows of the forfeiture, it is a dispensation; for why should not the acceptance and acknowledgment of the tenant to be tenant after a forfeiture, as well dispense with a forfeiture, as acknowledgment of the heir to be a tenant? But it was resolved in that case, that if the lord had once entered for the forfeiture, no acceptance afterward shall conclude him.

If the tenant appear not at court after personal warning, and the lord amerce him, this is a dispensation with the forfeiture. If a copyholder come to his estate tortiously (it seems it must be by admittance, else the release will not operate at all) (e) and commits a forfeiture, and then he that hath right releases to him, this shall hinder the lord's entry, because now he hath, as it were, another estate, of which he hath committed no forfeiture. *Sed quære* (f). 1 Leo. 104.

If the tenant repairs before the lord enters for forfeiture, this purges the forfeiture. Cutting trees to repair, and employing them five years after, purged the forfeiture. [249]
1 Brow. 149.
Moor, 393.
Latch, 227.

The succeeding lord shall not take advantage of waste done in the time of the preceding 2 Sid. 8.

(e) [See *ante*, 157. N. LXIX.] (f) [See N. CVIII.]

Ed. Raymoud,
3000.

Pal. 446.
Lat. 227.

[250]

5 Co. 116.
Moor, 512.
1 Roll's Abr.
727.

lord (g). But yet it was adjudged, that if there be lord, and two coparceners copyholders, and one makes a feoffment in fee of her part, and then the lord makes a lease of the manor, that though the lessee can take no advantage of the forfeiture, that yet the heir of the lessor may. The reason of the diversity seems to be, because waste is a prejudice to the lord only, for the time being at least; and is not so great a prejudice as feoffments, (and so it seems of other forfeitures, as denial of rent, suit of court, &c. and *a fortiori* for these forfeitures, for the denial doth no way prejudice the succeeding lord;) but feoffment divests the lord of his freehold and inheritance; which being standing prejudices to the lord, he ought to have remedies as lasting as the harm that is done him. *Quere*, If the lessor outlives the lease, whether he may take advantage of the forfeiture?

Upon entry for the forfeitures the lord shall have the emblements (b); so if it were leased (i), copyholder (k) for life, remainder to another for life, the tenant for life accepts of a bargain and sale of the freehold and inheritance

(g) [Salt. 186. Cro. Jac. 301. acc.

Unless it be to the disherison of the lord;

See below, and 3 Durnf. and East, 173. and ante, 247. (c)
334. N. CLXXVII.]

(b) [See N. CIX.] (i) [See N. CX.]

(k) [This should begin a new line.]

of

of his lands, to him and his heirs, and then of a fine: This does not displace the remainder; but he has power to take at any time after the death of tenant for life (1). If the lord grant a rent-charge out of the inheritance of copyhold land, and then grants the freehold and inheritance to the copyholder for life, he shall hold the land discharged during his life; so if there be a remainder over, it shall not commence during the estate for life. A lord may make a grant or admittance of a copyhold out of the manor, at what place he pleases; but the steward cannot, at a court held off the manor, make any grants or admittances (m); and in *Coke's 1 Inst. 58. a.* he says, that a court-baron cannot be held off the manor, unless the lord hath two or three manors, and hath usually kept court at one for all; which plainly shews, that a lord cannot make admittances or grants at a court held off the manor, no more than the steward. For *Coke* says, that if the court-baron be held off the manor, it is void; and he there speaks of a court-baron as including the copyholder's court, where the steward is judge: But as hath been said before, a lord may make admittances or grants out of the manor, at what place he pleases, which are *Coke's* words, and must be understood not at a court, but at some other time, or else he contradicts himself. It is held, that if the inheritance of copyholds be granted to one,

9 Co. 106.

9 Co. 107. a.

4 Co. 26, 27.
1 Leo. 222.
cont.

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1 Inst. 61. b.

(1) [See *ante*, 246. N. CVII.] (m) [See N. CXI.]
he

Cro. El. 103.

Co. Cop. 128.

2 Cro. 526.
Cro. El. 443.
cont.1 Cro. 273.
1 Leo. 86.
Co. Cop. 92.9 Co. 75.
1 Leo. 36.
cont.1 Inst. 59. a.
Ld. Raym. 76,
656, 658.

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he may hold courts where he will (*n*); for it is no longer a court-baron; and that the lord or his steward may grant copies out of court, as well as in court: And as the case is reported by *Croke*, the grant was at a court held at another manor. But as *Coke* reports it, though the grant be at another place, yet it is not said to be done at a court (*o*); so *quare*, Whether a steward may make grants by copy out of court (*p*)? but if a steward can, an under steward cannot (*q*).

It seems a steward (if specially empowered) (*r*) may take a surrender out of court. A copyholder may surrender to the lord by attorney in court, because he may do that *communi jure*, and so the common law gives him power to do it by attorney, as an incident to his estate (*s*). So a surrender to the lord out of court is *de communi jure*, and therefore may be by attorney. But if the surrender be by the hands of two customary tenants, there it cannot be done by attorney without a special custom. Admittance by the lord in court, and out of court, seems to be *de communi jure*, and therefore it seems may be done by attorney. It is said to be resolved, that a copyholder cannot surrender by attorney with-

(*n*) [1 *Leon.* 288. *Ca.* 394. *Cro. Eliz.* 103. *acc.* but see the last page, N. CXI.]

(*o*) [See N. CXI. in last page.]

(*p*) [See *Cro. Eliz.* 103, and N. CXI. in last page.]

(*q*) [See N. CXI. last page.] (*r*) [See N. CXII.]

(*s*) [See *ante*, 216. N. XCIII.]

out deed, *Pract. Reg.* 136. but that he may be admitted by attorney without deed. *Quare* of this (t).

If the copyholder be in prison, and that he cannot come, the lord (u) may appoint a special attorney to go to him and take his surrender. 1 Leo. 36.

Any words spoke by a copyholder in court, shewing his intention to surrender into the lord's hands, amounts to a good surrender (w); as if he come in court and say, that he is weary of his copyhold, and desires his lord to take it, this is a surrender; but to say he renounces his copyholder, this is no surrender, because he limits it to no body*. So if he say he is content to surrender, it is no surrender; for that only expresses his inclination to do it, not that he actually doth it. *Quare*, Whether words spoke out of court will amount to a surrender (x)? 3 Bullst. 80.
Hutton, 81.

Sir H. P. lord of a manor, whereof C. was a copyholder in fee, and the lord pretended that his copyholder had forfeited, and thereupon entered into communication with him about it; and it was agreed between them, that C. should pay 5*l.* to the lord, and should enjoy the said customary land (except a wood) for his life; and that C. should have election, whether he would [253]
1 Leo. 191.

(t) [See N. CXIII.] (u) [See N. CXIV.]

(w) [See *Com. Dig. Copyh.* (F. 6). *Vin. Copyh.* (Z). *Lex Cusl. c.* 13. p. 102, &c. *Post.* 312.]

(x) [See N. CXV.]

* [See *post.* p. 254. (a).]

have

have those lands assured to him by copy, or by bill; and he chose by bill, which was accordingly done; adjudged this was a good surrender for life only, and that the lord had the wood discharged of the customary interest. Now the communication in this case seems to have been that which caused the surrender, for nothing else could; and for ought appears, this communication was out of court. The acceptance by bill could not be the surrender in this case, for the bill was never made of that; so that it could only be the communication that amounted to a surrender.

3 Bull. 30.

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1 Roll. Abr. 301.

1 Rol. Rep. 265.

1 Rol. Abr. 171, 372.

Copyholder in fee comes into court, and there accepts a copy to himself for life, remainder to his wife for life, remainder to his son for life; this is tantamount to a surrender to the use of himself, &c. but he hath his old reversion in him; for there is no ground to make a surrender of that by construction, because he has made no disposition of it (y). But as this case is in *Rolls*, it is said, that it was no surrender; for that a copyhold cannot be surrendered by a surrender in law, but only by actual surrender; yet as it is in other places in *Rolls*, it is as in *Bulstrode*, held to be a surrender, but that the reversion was still in the copyholder.

A. covenants with B. to assure him all his copyhold lands, and after he surrenders divers par-

cells by name, and some by buttals and boundings; at the next court the surrender is presented and inrolled, but with this addition, by the name of all his copyhold lands; there no more shall pass than what was named in the surrender (z). Dyer, 251. b.

If a surrender be made to the lord expressing no use, it shall be to the use of the lord (a); for it cannot be imagined that the surrender was made to no end or purpose; and a surrender may be made to the lord, and no use need be expressed. If a surrender be made to the use of another, without expressing what estate he shall have; a custom that the lord may grant it in fee to him to whose use the surrender is made, is a good custom (b), for he is a chancellor in his own court; and so when the thing is left uncertain, it is no way unreasonable for the lord to determine what shall pass. If a man bargains and sells copyholds lands, it seems nothing passes but a use; for copyholds are out of the statute of uses, and therefore such a bargainor may afterwards surrender it to the use of the bargainee; and no estate passing, it seems to me to be no forfeiture (c). Kitch. 81. b.
Co. Cop. 95.

Cro. El. 39a.
[255]

(z) [See *ante*, 192.]

(a) [See N. CXVII.]

(b) [But without such custom or future explanation, he shall have only an estate for life. See *ante*, 3. N. VIII. 219. and *post*. 258.]

(c) [See N. CXVIII.]

Poph. 125,
126.
Cro. Ja. 434.

Copyholder in fee surrenders to the lord without declaring the use; at the next court, it was regranted to him and his wife in tail, remainder to his right heirs. Now this subsequent admittance explains to what use the surrender was made.

4 Co. 29. b.

Cro. Car. 205.

A copyholder in fee surrenders to one for life, the lord admits him in fee (*d*), yet the surrenderor has a reversion in him; for the lord is but an instrument, and cannot divest the estate of him that surrenders. But if there be a copyholder for life, and he surrenders to the use of another for life, who is accordingly admitted, and then dies, yet the surrenderor shall not be admitted again; for by the surrender he passed away all his estate, and had no interest left in him. If the surrenderor had died, it seems that the estate of tenant for life was not ended (*e*), for then the lord would have two deaths to depend upon, either of which would bring him to the estate, and yet but one person that had an interest.

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Mo. 8. n. 27.

1 Rol. Abr. 503.

Custom that lessee for life may let for another's life, is void. It seems if there be a visible inconvenience, that one copyholder for life should change the lives by surrendering into the lord's hands to the use of another for life, that the lord

(*d*) [See *ants*, 193. 4 Co. 28. b. See also 3 Burr. 1543.
4 *Ibid*. 1961. 5 *Ibid*. 2776.]

(*e*) [See N. CXIX.]

will not be compelled to make admittances thereupon.

Feme tenant for life of a copyhold, took husband, and the reversion of the same was granted to three for lives, and then the baron surrendered to the use of the first reversioner for term of his life, and so he was admitted tenant, and died; and then the second died; and the third prayed to be admitted; and his copy was *cum acciderit post mort. sursumred. vel forisfac.* of the woman; and it was the opinion of the justices, that he ought not to be admitted; but the lord may retain it in his hands as an occupant (*f*). The reason is, because the interest of the feme was concerned, who had not surrendered (*g*). But there was this further in the case, that baron and feme would have released their right to the reversioner, but the lord would not hold a court for it: But it was decreed in chancery that he should either hold a court or quit the possession. [257] It is resolved in my lord *Coke's* reports, that when a copyholder surrenders to the use of another, and the lord admits him, that he is in by the *Per* by him that makes the surrender (*b*). This being spoke so generally, cannot by any fair construction but extend to all surrenders, 4 Co. 27. b.
29. b.

(*f*) [*i. e.* During the life of the husband; for, on his death, his widow might have entered. See *Dyer*, as cited in the margin.]

(*g*) [See *ante*, 190.] (*b*) [See *ante*, 218. N. XCIV.]

T

either

either by tenant for life or in fee. But in the case of *King* and *Lord* it is adjudged, that if a copyholder for life surrender to the use of another for life, who is accordingly admitted, that he is in from the lord, and not from the surrenderor. *Popham* 39. *Quære* well of this matter (*i*); for the tenant for life hath not such an estate as to be allowed to grant for life to another; but when a copyholder in fee surrenders to the use of another for life, he is in *quasi* by the copyholder. This is against my lord *Coke*, and as it seems against reason, for the lord is but an instrument to convey; therefore he is compellable to grant according to the surrender (*k*); and no charge by him, while it is in his hands, shall be of any force; and he that surrendered shall pay the services; and the words of *Coke* are general, that he shall be in by the copyholder, in admittances upon surrender: Yet *Coke* says in another place, that by surrender to the lord out of court, the estate passeth to the lord under a secret condition, that it be presented at next court. But it hath been adjudged since, that by surrender to the lord by the hands of two tenants, nothing passed, but the interest remained in him that made the surrender (*l*); and there can be no difference where the lord takes himself by the hands of two tenants; and if it be

Cro. Car. 204.

Cro. El. 361,
442, 582.[258]
Co. Cop. 108,
109.1 Inst. 62. a.
1 Leo. 101.
Cro. Ja. 403.
Cro. Car. 283.
Co. Cop. 103.(i) [See N. CXX.] (k) [See *ante*, 193. 255. (d).](l) [See *ante*, 163. N. LXXV. 193. N. LXXXV.]

in the lord, how can the copyholder pay the services, or take the profits after surrender, or Ld. Raym. 44. make another surrender?

As well estates as descents of copyholds are to 4 Co. 29. b. be guided according to the rules of common law, as a necessary consequence upon the customary estates. So that if a surrender be made to the use of one, he has but an estate for life (*m*), unless there be a custom to the contrary; for by custom a use limited to one & *assignatis suis* is Yelv. 16. good to pass a fee. A surrender to one & *tribus assignatis suis*, adjudged but an estate for life; but in some cases estates in copyhold lands are not guided according to the rules of common law. As where a copyholder in fee surrenders to the lord, who regrants it in this manner; *Memo-* [259]
randum, Quod J. W. cepit de domino ceux terres, Cro. Ja. 434.
cui dominus inde concessit feifinam habend. eidem One named after the habend. may take copyhold estates.
J. & Eliz. uxori ejus & hæred. eorum in tail; ad- Poph. 125.
judged that Eliz. took by force of this copy, 2 Rol. Abr. 67.
though she was not named before the *habendum*. But it was said, that there was no more grant to the baron than to the feme; and yet there are the words *cepit de domino cui dominus concessit feifinam*, which seems to amount to a grant. But since the judges thought that the baron did not take before the *habend.* no more than the wife; this case doth not fully prove, that a person may take that is named after the *habend.* when there is

(*m*) [See *ante*, 219, 220. 254. N. CXVI.]

another only named in the premises; for when both are named in the *habend.* only, the admittance would be to no purpose, if both could not take; and perhaps at common law, if there be no body named in the premises, *habend.* to two, they shall both take, else the deed could have no effect; but an admittance to one *habend.* to him and another, may be good; *sed quare* (n).

1 Inft. 7. a.

Co. Cop. 97.

Cro. Car. 366, 7.

1 Brownl. 127.

Noy 152.

1 Ld. Raym. 44.

An estate-tail in copyholds cannot be created by implication, any more than in freeholds; and if in surrenders there be at first good limitations of uses, and then afterwards comes a vitiating clause, such clause shall be rejected.

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Cro. Car. 367.

Cro. El. 255.

If a surrender be to the use of *J. S. habend.* after the death of the surrenderor for life, this is a void surrender, being but one entire limitation; but if the surrender were to him generally, *habend.* after the death of *J. R. quare*, If the *habend.* be void or not? But certain it is, that if the surrender be *habend.* after the death of the surrenderor, *ad opus & usum* of his child then in *ventre sa mere*, such surrender is merely void; for a copyholder cannot surrender *habend.* after his death, and so reserve to himself a particular estate, no more than a freeholder can convey so. There was a clause in a surrender: And if it happen that the child die before his full age, or day of marriage, then I do surrender the said lands to the use of my cousin *J. S.* his heirs and

Cro. Ja. 376.

Cro. El. 29.

1 Sand. 151.

1 Roll. Rep.

135.

March. 177.

(n) [See N. CXXI.]

assigns:

assigns: This surrender was held to be void to J. S. because the contingency did not happen in the life of the surrenderor; and a man cannot surrender to take effect after his death; it was not resolved absolutely that a fee may be limited upon a fee. *Vide* the book cited in the margin, to explain these matters. This case, as reported by *Rolls* (as it is said in *Lex Cus.* 120.) is an authority that such future use is good. This is the same case as is reported by *Croke*, but directly contrary, and as it seems not grounded upon so good reason as the resolution in *Croke* (o); for, as before has been shewn, surrenders are not construed so favourably as wills (though *Coke* says they should be taken according to the intent of the surrenderor); neither is there the same reason; for a man may as well order a surrender in his lifetime, according to the rules of law, as he may any deed to pass away a freehold estate; so that the intention of the party hath not so strong an operation in a surrender, as in a will; and therefore that reason will not support a fee upon a fee in that case, as it doth in a will (p). And then it is not at all like a use or trust, in which a fee may be limited upon a fee, because there

1 Rol. Rep.
109, 138, 253.

[261]

Co. Cop. 97.

(o) [See 1 *Fearne Conting. Rem.* 416. 418. where that acute writer says that the opinion of our author is, he thinks, excluded by decided cases.]

(p) [See 1 *Fearne*, 417. and the cases by him cited, that a fee may be limited on a fee of copyholds.]

the legal estate was not by any limitation extended further than one entire fee-simple, which would be to extend an estate further than its original creation warranted. But a use, after a use in fee, was but only to give an equitable right to somebody to have the profits, as long as the estate in fee lasted ; which is highly reasonable, that a man that hath a legal estate should dispose of the profits of that estate as long as it should last ; for so long had he a right to the profits himself, which right he may transfer to others, and there is no harm done to any body ;

[262] but to extend the legal estate, would be to keep the lord of the escheat eternally out ; and it is only allowed in a will, because of the want of counsel to advise with how to do it. But a use in a surrender is not like this use ; for he that hath a use by a surrender is to be admitted to the legal estate, and is not seised to use ; and therefore if a fee might be limited upon a fee, in such cases the legal estate would be extended further than its original creation warranted, and a great estate be made out of a little one ; so that it seems that a fee upon a fee in copyholds, is not good.

Cro. El. 361.

A surrender was to the use of one in fee upon condition that he pay 100*l.* to a stranger ; and if he failed, it should be to the use of the stranger in fee ; it was moved, whether this were a good limitation, to add fee upon fee. The court directed the matter to be found specially ; and it doth not appear what became of it afterwards ;

but

but *B.* (*q*) conceived the limitation to be good enough, and compared it to a use upon a feoffment (*r*); but for the reasons before, it seems it cannot be compared to the case of a feoffment to uses.

A copy was granted to the father and his son, Cro. Jac. 374. he having but one son; this is good for the ap- [263] parent certainty. But if he had many sons, void. Yet *Coke* says, that if a man surrenders to the use of his son *W.* and he has more sons of that name, this uncertainty may be helped by averment (*s*). But if a man surrenders to the Co. Cop. 95. use of his friend or cousin, this is void, and not to be helped by averment, for the uncertainty. So if the surrender be to the use of *J. S.* or *J. N.* *Coke* in his copyholder (*t*) saith, that a man may surrender copyholds immediately to the use of an infant *in ventre sa mere*; for that a surrender is a thing executory, and nothing vests before admittance; and therefore if there be a person to take at the time of the admittance, it is sufficient; which seems to be reasonable, Mo. 637. cont. 1 Rol. Rep. 109, 138, 203. and to carry no inconveniency with it; for it is not like a grant at common law; for there if there be no body to take, the grant is void, because the estate must be somewhere (*u*), and the

(*q*) [*Beaumont, J.*] (*r*) [See the last page.]

(*s*) [See 5 *Co.* 68. *b. acc.*] (*t*) [S. 35.]

(*u*) [See *N. CXXII.*]

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grant puts it out of the grantor. But in case of a surrender, there is no inconvenience at all; for the surrenderee hath nothing till admittance, but the estate is in the surrenderor. But then it seems, that if the surrenderee be not *in esse* before the admittance, that the surrender will be void; for this seems to be implied by lord *Coke*; for he says that if at the time of the admittance the grantee be *in rerum natura*, that will serve; which implies that the admittance is to be made after the usual manner: Not that the admittance-time shall be put off till there be such a person; for then it would have been to no purpose to have said, that if there be such a person to take at the time of the admittance, &c. for there is no question but that it will serve, if the admittance must be staved off till there be such a person; and no question but that the grantee will be *in rerum natura*, if the admittance be to be put off; and so he need not have made a question, If he be, &c. And if he never come *in esse*, then the admittance-time will be eternally put off, the old surrender stand good, and no body be able to dispose of the copyhold estate.

Cro. Jac. 376.

2 Roll. 791.

1 Roll. Rep.

109, 131.

2 Roll. Abr.

415, 416.

2 Bull. 274.

275.

In the case in *Croke*, no question was made but that the surrender to one *in ventre sa mere*, was good; yet it seems it is not fully settled, whether a devise to an infant *in ventre sa mere*, be good or no. *Ideo quare*. However, in the last case, there is no body to do the services till the

the birth, and in the former the estate continues in the surrenderor, &c.

A copyholder surrenders to the use of the right heirs of J. S. he being alive, void; for it cannot take effect *in presenti*, as he would have it. If a man surrender to the use of his own right heirs, *quære*, Whether the lord shall not hold it till his death (*w*)? Co. Cop. 97.
1 Lco. 101.
[265]

A copyholder by licence lets for sixty years, to commence at a time to come; but before that time the lessee enters, and then the copyholder surrenders his reversion, it seems the surrender is void, because the entry before the time was a disseisin. Lit. Rep. 17.
12.

Copyholder for life, remainder to another in fee, the remainder-man surrenders to the use of tenant for life, the remainder to another, though the estate limited to tenant for life be void, yet the remainder over is good, and vests presently. It is made a doubt whether by the destruction of the particular estate, the remainder that is in contingency be destroyed (*x*). As to this point we ought to distinguish; for it seems some are, and some are not. As for example: If an estate be given to a copyholder for life, the remainder to the right heirs of J. S. if the tenant for life die, living J. S. there it seems clear that the remainder is destroyed; for it cannot take effect, 1 Sid. 36a.
Style 258a

(*w*) [See *post*. 272, 3.] (*x*) [See 1 *Fearne*, 469. &c.]

as by the limitation it ought. But then if tenant for life in that case had committed a forfeiture, or made a surrender, and then living tenant for life, *J. S.* had died, it seems to be very clear that his right heir might take; for his estate in remainder was not to take effect after the determination of the interest of tenant for life, but after his death (*y*), and when that happened, he was able to take.

¹ Roll. Abr. 794.
² Co. 107. 2.

¹ Roll. Rep.
² 38, 317, 438.
³ Roll. Abr. 415.

Lane being married and seised of a copyhold in fee, surrenders it to the use of *Dixon* and the wife of *Lane* for their lives, and after to the use of the heirs of the body of the husband and wife; the wife and *D.* are admitted, to them and their heirs; and afterwards *D.* surrenders his moiety to the use of husband and wife, and their heirs; and then they surrender to the use of one *Davis* in fee; then the wife dies, having issue, and then the husband dies, and the heir brings trespass; it was held, that though the husband and wife were admitted in fee, yet that did not alter the estate, but they shall be seised according to the surrender; and then when *D.* surrendered his moiety, this severed the jointure; and then the great question was, What estate the woman had, whether for life or tail? for if she had only an estate for life, then he that was to take the remainder by force of the limitation, being to be heir of the body of the husband as well as wife,

(*y*) [See N. CXXIII.]

could

could not take, because the husband was alive; and so the remainder for a moiety was destroyed. But then as the case is put in *Lex Cust.* 122. though it be said that the husband was dead also; yet nothing was said as to his moiety. *Ideo quere* of this. But then if a moiety were executed in the wife, her heir might take a moiety, as heir by her descent. And it was held that there was no execution, but that the remainder was a contingent remainder, and gone for a moiety by the wife's death. This resolution does not at all thwart the distinction before taken, that the remainder should be destroyed; for the estate, that it was limited after, being gone, and the time being come in which it was to commence; if it could not commence then, it never could. But it is not like the case where an estate for life is forfeited, and the remainderman cannot then take, but after the death of tenant for life he may. But let us now examine a little into the reason of this resolution. And first, it is very clear that the estate could not be so far executed in the woman, as to destroy the jointure; for that had been apparently to overthrow the design of the settlement. But this does not seem any good ground to conclude that therefore heirs in that case should be a name of purchase. For if an estate be limited to two, and the heirs of one, though the jointure be not severed, and to that intent the fee not executed, yet *heirs* are there words of limitation, and not of purchase.

Then

Tenant for life, remainder for life, he in remainder enters on tenant for life, and surrenders; nothing passes; for he is a disseisor. 1 Mod. 199.

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Then let us examine a little farther, and see what could be the ground the judges went on to think that the rule, when the ancestor takes an estate for life, &c. can have no operation. Indeed the case has this particular in it, that the heir who is to take, is not only to be heir of the ancestor who hath the tenancy for life, but to another person who took no estate at all (z); and so it seemed the design of the party to settle one entire interest in such a one: And there appears no footsteps of his intent, to make him take one moiety by descent, and another by purchase. But notwithstanding this, there seems to be a manifest inconvenience in the resolution; for if it be construed a contingent remainder, then we suppose a deed made, and an estate given; where, at the very first it appeared, that for one moiety, the deed and estate could have no manner of effect, unless the husband and wife died both at one nick of time (a); for if the husband died first, then the person who was to take, being to be heir of the wife, and she being alive, &c. and so *vice versa*. But if we construe it to be executed in the wife, so far as to make it an estate-tail, though not to destroy the jointure, there the deed will have an

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(z) [See *Watk. on Desc.* c. 5. p. 162.]

(a) [See 1 *Fearne*, 459. where that writer considers our author as mistaken on this point. The case on which he comments does not, says Mr. *Fearne*, involve any such inconsistency as he infers; but the inconvenience arose from the subsequent acts.]

operation ; for one moiety it will be executed in the wife, and when she dies, the heir of her body by her husband begotten will inherit to that moiety, as heir to her ; and as for the other moiety, it will be a contingent remainder to vest in the heir of the husband, if he die living the particular tenant. And in this case the estate being made over to him, and by him conveyed to another, nothing but an estate for life could pass by that surrender. But then if it were for the life of the surrenderee, and then the husband died, the contingent remainder was gone. By this construction the intent of the parties and the rule of law is satisfied. And according to ; *Leo. 4.* this construction was a case adjudged, where a surrender was made to the use of the wife for life, remainder to the right heirs of husband and wife. Here the opinion of the court was, That a moiety was executed in the wife (*b*), and that upon her death her heir should have a moiety ; and that if the husband had died first, his heir should have had a moiety. This case is directly contrary to that next preceding, and seems to be grounded upon better reason. But *quære* well, whether that case be reported as it is said to be ? for he saith, that *Coke* held the estate-tail to be

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(*b*) [See 1 *Fearne*, 460. where it is observed that this decision is contradicted by several adjudications, and consequently is not law. And see *Watt. on Desc.* c. 5. p. 162. and *post.* 272. N. CXXV. and CXXVI.]

executed in that case, but that the reporter conceived the contrary; and yet before, in *Lex Cust.* 121, 122. he tells us, that *Rolls* conceived that a contingent remainder was not destroyed by the destruction of the particular estate. The case before proves that the rule, where the ancestor takes an estate for life (*c*), &c. takes place as well in copyhold (*d*) as freehold estates; and indeed what reason can there be why it should not; for if it be reasonable in freehold lands, why not in copyholds; for the rule takes not its rise from the nature of the land; and it is regularly true, that estates and descents in copyhold lands are to be guided according to the rules of common law.

Style 249, 271.
2 Roll. Abr.
253.
1 Inst. 2. b.

A. seised of a copyhold in fee surrenders it to the use of his last will, by which he devises it to *B.* for life, and after his death to the heir of his body begotten, for ever; it is said to be adjudged (*Lex Cust.* 124.) that *B.* had a fee executed in him; but it seems that must be meant of a fee-tail, because the heirs are restrained to the body of *B.*(*e*) This case does not at all contradict *Coke*, who says that if an estate be given to a man and

(*c*) [Rule in *Shelly's case*, 1 Co. 104.]

(*d*) [See *Watk. on Desc.* c. 5. p. 167. and *post.* 272. N. CXXVII. *acc.*]

(*e*) [The words "for ever," added to a limitation, "to the heirs of the body," will *not*, it should seem, turn the estate-tail into a fee. See *Dougl.* 324. and see also 10 Co. 44. *a.* and 1 P. *Wms.* 366.]

his heir, he hath but an estate for life, for that is meant by feoffment, &c. for he himself says, in the next folio, that if a man devise land to a man *in perpetuum*, it is a fee. And here the devise was to a man and one heir *in perpetuum*, which sure will create a fee, as well as where the word *heir* is left out; but because it is added *heir of his body*, it seems the design was to give a lasting fee-tail. Neither is it like *Archer's* case, where the devise was to one for life, and after to his heir male, and to the heirs male of the body of such heir male; for there there wanted the words *for ever*, to give a fee-tail to the first tenant for life; and besides, there the inheritance is by express words given to the issue (f). 1 Inst. 9.

Husband seised of lands in fee makes a feoffment to the use of his wife for life, and after her decease, to the use of the right heirs of the bodies of him and his wife engendered; they have issue, and the wife dies; and the *quære* in the book is, Whether the issue may enter in the life of his father, or after his decease? And then the book goes farther and says, & *come semble nemy*, because he cannot be right heir of the body of his father, living his father. This case, as far as it is an authority, coming in only by a *come semble* of the reporter, is against the opinion, in the preceding page, and seems to be unreasonable; for unless the limitation to the heirs Dyer, 99. [272]

be executed for a moiety in the feme (*g*), it is impossible it should be of any effect; for if the husband dies first, the reversion will descend to the heir, which will be preferred before the contingent remainder (*b*), that is to take effect upon the death both of him and his wife; and if the wife dies first, and then the husband, the contingent remainder is destroyed, because it could not take effect upon the death of the tenant for life.

2 LEQ. 301.

When a copyholder surrenders to the use of himself for life, and then a limitation is made to his right heirs, these are words of limitation, and not of purchase; but when a stranger takes an estate for life, and after a limitation is to the right heirs of the surrenderor, there, according to *Coke*, heirs are words of purchase, and not of limitation; and the reason he gives is, because the estate is out of the surrenderor; which it seems from what has been said before, it is not. But yet when the surrenderee is admitted, he is in by relation from the surrenderor. *Idco quare* (*i*). According to *Coke*, if a copyholder surrender to the use of his own right heirs, the lord shall hold the land during the life of the surrenderor. *Quare* of this (*k*).

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(*g*) [See N. CXXV.] (*b*) [See N. CXXVI.]

(*i*) [See N. CXXVII.]

(*k*) [See *ante*, 265. Such a surrender is not very likely to occur; as a copyholder would scarcely surrender *merely* to the use of his own right heirs, who would have the estate without such surrender. But if it were made, the law seems to be with lord *Coke*.]

A copy-

A copyhold, demisable for three lives, was Mo. N. 922. demised to one for life, the remainder to another for life, and then to the first son of the woman he should marry; these two remainders not being warranted by the custom, are void; for that warrants only one estate with several limitations, but the first estate for life being warranted by the custom, is a good estate (*l*).

A man seised of copyhold lands, devised a certain parcel of them to his wife for life, the remainder to his brother and his heirs, and afterwards, in presence of three persons of the court, said to them, I have made my will as I will have it, and here I surrender all my copy- 3 Leo. 18. hold lands into your hands accordingly; not all his copyhold lands are surrendered, but only those mentioned in his will; for he had respect to that, in making his surrender; and he said he surrendered all his copyhold lands *accordingly* (*m*); which shewed his intent was only to pass those lands that were devised by his will. Here was no question about the validity of the surrender, which was only by parol, and into

(*l*) [Note, The case in *Motre* (677. *Ca.* 922.) was, to one for life, remainder to such woman as he should marry, with remainder to the first son of his body. And all the justices were of opinion, that the two remainders were void; but that the first limitation for life was good.

But *quære* of this case! and see 2 *Lord Raym.* 994. 1 *Salk.* 188. and *post.* 323.]

(*m*) [See *ante*, 120. N. XLVI. and *post.* 330. (*e*).]

the hands of three tenants of the court; but it is not said in court; and indeed the case cannot well be supposed to be in court; for then the surrender had been to the lord or steward, and there can be no reason why a surrender in court by words should be of more validity than a surrender by words out of court (n).

2 Bull. 274.

Cro. Jac. 199.

If a copyholder surrenders to the use of his last will, and therein nominates and appoints that such a one shall have the land for life, and after his death gives authority to sell the lands; in such case they may be sold without any new surrender; and the vendee shall come in by the will, to which purpose the first surrender is sufficient (o).

Lit. Rep. 23.

Copyholder in fee surrenders to the use of his last will, which he said he would leave with his partner *Moss*; *Moss* dies; he recites the surrender, and makes his will; it seems the devisee shall have the lands; for these words, That he would leave in the hands of his partner *Moss*, are only words of demonstration, and no way operative or restrictive of the operation of the surrender, or devise. And it is a rule in law,

(n) [See *ante*, 252. N. CXV.]

(o) [2 *Wils.* 400. *acc.*; and see also 1 *Atk.* 96. and *post.* next page.

In this case an *authority* only is given, and consequently no admission can be necessary; but had any *estate*, or *legal interest* passed, it would have been otherwise. See *ante*, 157. N. LXIX.]

when an act is to be done, with reference to another thing, which is impossible, illegal, or variant, the act shall stand, and the reference be void.

A copyholder in fee devises it to his wife for life, and that she should sell the reversion for the payment of his debts; and afterwards he surrendered the lands to the use of his wife for life, according to the will and deed. Adjudged she might sell the lands, because in his surrender he referred to his will; and afterwards she surrendered upon condition to pay 12*l.*; this was held to be a good sale, according to the will. [275]
Cro. El. 68.

Two jointenants, one surrenders his moiety to the use of his last will, and dies before the surrender is presented, but after he made his will, this is a severance of the jointure; for being presented, it relates to the time of the first surrender (*p*). Cro. Jac. 100.
1 Inst. 59. b.

A copyholder surrenders to the use of another, who, before admittance, surrenders to another, who is admitted; no interest is hereby vested in him; for the first surrenderee had nothing in him to give over (*q*); and the admittance of the second surrenderee amounted not to an admittance of the first; but an heir Yelv. 144, 145;
1 Roll. Abz.
505. cont.

(*p*) [See *ante*, 218. N. XCIV. and 2 *Vef.* 639. *acc.*]

(*q*) [See *ante*, 163. N. LXXV. *Fisher on Copyh.* 131. 148. *Com. Dig. Copyh.* (G. 1); *Co. Litt.* 60. a. n. (2); and *post.* 283. N. CXXX.]

3 Puist. 230.
cont.

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Cro. Jac. 36.
1 Roll. Atr.
499.

may surrender to the use of another, before admittance (*r*); for he has the legal estate and interest in him. A copyholder may surrender to the use of another upon condition, that if the surrenderor pay such a sum of money, at such a day, the surrender to be void. After the admittance of such surrenderee, if the surrenderor pay the money, he may re-enter, and shall have the land without any new admittance, or any new fine; for he is in of his old estate (*s*). So he may surrender, reserving rent; and that if the rent be not paid, he may re-enter; and there no fine or admittance is to be had (*s*). But in case where the day of payment of money by the surrenderor is past; so that he hath only an equity of redemption, there it seems he must pay a fine, and be re-admitted (*t*).

no. El. 361.

A surrender was upon condition to pay 100*l*. to a stranger, he tenders the money, and the stranger refuses; the question was, Whether the condition be saved? and it was the opinion of one justice, that the condition was saved; the other justices directed it to be found specially. This case seems now to be beyond all doubt, that the condition is saved; for it was the design of the parties that the surrenderee should retain the land; therefore if a feoffment be

1 Inst. 209. 2.

(*t*) [On satisfying the lord for his fine. See *ante*, 163. N. LXXV and LXXVI.]

(*s*) [See *ante*, 181. (*s*).] (*t*) [See 2 *Vesf.* 301.]

made in fee on condition, that the feoffee shall grant a rent-charge to a stranger, if the feoffee tender the grant, and he refuse, the condition is saved.

A copyholder surrenders to the use of J. S. [277] paying his executor 100*l.* this is a present surrender; for otherwise it can be of no effect. A ² Bull. 275. copyholder in fee surrenders to the use of his son in fee, upon condition he keep the covenants in such an indenture, and pay 10*l.* The son surrenders to the use of another in fee, but neither keeps the covenants nor pays the 10*l.* the father enters, and dies seised, the son enters as heir to him, and the surrenderee of the son enters upon him; but his entry was adjudged unlawful; for by the father's entry for the condition broken, the whole estates, both of his son and his surrenderee, were defeated. Cro. El. 239.

An infant surrenders copyhold lands, he may at full age disagree and enter; for in case where an infant makes a feoffment in fee, he may enter, much more in case of a surrender; for a feoffment is a conveyance, which will work a discontinuance, but a surrender will not (*u*). A feme covert may surrender (*w*), being solely examined by the steward (*x*): and if there be a

1 Leo. 95.
Popl. 30.
Tot. 108.
Cro. El.

(*u*) [See *ante*, 190. (*k*).]

(*w*) [See N. CXXVIII.]

(*x*) [Though such steward be retained only by parol, and without alleging a special custom to do so. *Cro. Jac.* 526. *pl.* 2. and *post.* 312.]

custom (*y*) for her to be examined before two tenants out of the manor, it is good. A surrender to the steward to the use of the steward is good, to give the steward an interest (*z*), for the surrender is in truth to the lord, and not to the steward. A copyholder surrenders to the use of *A.* in trust, that he shall hold the land until he hath levied certain monies, and that afterwards he shall surrender to the use of *B.*; the monies are levied, *A.* refuses to surrender, *B.* exhibits his bill to the lord of the manor against *A.* who, upon hearing the cause, decrees against *A.* that he shall surrender, *A.* refuses, the lord may seise and admit *B.* for he is chancellor in his own court.

1 Leo. 2.

It seems that the presentment of a surrender in court, is only by way of instruction, to let the lord know of the surrender, and accordingly he may admit; for it is apparent that a presentment is not of necessity (*a*), because the lord may admit out of court; and any act of the lord's consenting to the surrender will amount to an admittance, which plainly shews that a presentment is only to shew there was such a surrender; for if it were of necessity, then there

(*y*) [But two tenants cannot take such examination without a special custom authorizing them so to do. *Cro. Eliz.* 717.]

(*z*) [*Cro. Eliz.* 717. and *ante*, 221. (*x*).]

(*a*) [1 *Roll. Abr.* 502. *Copyh.* (M). pl. 4. *acc.* and *see ante*, 259. N, CXI.]

could

could be no admittance out of court, nor no act implying the lord's consent would be *tantamount* to an admittance; and then if we go to the reason of the thing, since the estate is only to be surrendered to the lord, and by him transferred to the surrenderee, if he accept the surrender, and grant an admittance, which is all that can be done, what need is there of a presentment, and of what use can it be for the homage to present a surrender, in order for the lord's admittance, when the lord may take notice that there was such a surrender, accept it, and admit accordingly? The estate, as it was derived from the lord, so it must be surrendered to him, and the presentment makes no part either of the surrender or admittance. In itself, it is nothing but a notification that there was such a surrender, which if the lord takes notice of, without a presentment, it frustrates the end of a presentment, and the presentment is no ways of use. Therefore it seems, that if a surrender be made, and then a wrong presentment be made of this surrender, and then admittance is made according to the surrender, that this is good; for only the presentment can be void, and then there is an admittance upon a surrender, without any presentment, which, for the reasons before, seems to be very good. It is said in *Lex Cust.* 137. that a surrender must be presented by the same persons that took

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Co. Cop. 105.
Cro. Jac. 403.
4 Co. 29. b.

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it (b). So says *Coke*; but that this is not literally true, will appear from what he says in another place, that if he that took the surrender die, yet if presentment be made of it, it is sufficient; and it is said in *Lex Cust.* to have been held by *Wadham Windham*, that if a surrender be made to one tenant, and presented to have been made to another, yet that is nothing to vitiate the surrender; if the surrender be presented by any body, and admittance thereupon made, it seems to be well enough; for it is known that there was a surrender; and if the presentment should be void, yet the admittance is good enough without it.

Co. Cop. 105.
Style, 257.

Presentment, by the general custom of manors, ought to be made at the next court-day; but by special custom at the second or third court-day; the reason of this seems to be to prevent disputes; for if an old surrender might be trumped up at any time, it would defeat any aftercharges made by him that surrendered; which charges would appear to be good enough, since he is tertenant, and continues possession, and the surrender could not be known. But now let but the purchaser stay a court or two, and then he may be sure to know whether there is any incumbrance; for if the surrender is presented, then it appears, and he need not meddle;

(b) [See *ante*, 220. (c).]

if

If it be not presented, he knows it is void, and so may proceed (c).

A surrender is made by a copyholder upon condition, for payment of money, and then he makes a second surrender, and then a third; but between the second surrender and the third, he paid the money; and the question was between the two last surrenderees, Who should have the land, their two surrenders being only presented, and not the first; no court being held till after all the surrenders? And it was adjudged for the second surrenderee; for till presentment he had the whole estate in him; and it is said in the case, that if the surrender had first been presented, all mean acts had been void; but because that surrender was not presented, it was void. It seems this must be understood if the money had not been paid, or a court had been held before the money was due, and there the surrender had been presented; for it seems the presentment of the first surrender, after the payment of the money, had been void, because the surrender was void then, and a void surrender cannot be presented; and until a surrender be presented, it cannot bind the interest of the land; *sed quære?*

If a copyholder die seised, and the lord admits a stranger, this is no disseisin to the copyholder, but he is tenant at will (d). 3 Leo. 229.

Cro. Car. 273.
283.
Burgoin v.
Spurling.
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(c) [See *ante*, 220, N. XCV.] (d) [See N. CXXIX.]

There

Yelv. 144, 5.

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Cro. Ja. 403.

1 Rol. Abr. 505.
2 Sid. 61.3 Bulst. 230.
215, 216.

There are two cases which seem to be directly against admittances by implication; the one is, If a copyholder surrenders to the use of another, and the *cestuy que use* before admittance surrenders to the use of another, and the lord admits him, that this is no admittance of the first *cestuy que use* (e). The other is, A copyholder surrenders to the use of another, and he enters and pays rent to the lord, that this is no admittance of *cestuy que use*; and the reason given is, because the custom (of surrendering into the hands of two customary tenants, and presenting it at next court) is strict and ought to be pursued. But however there are cases of admittances by construction and implication, without any express admittance; and as the last case is reported by *Rolls*, it is said that the acceptance of rent out of court from the *cestuy que use* (the lord knowing of the surrender) is an admittance in law (f); yet as the case is reported by *Croke*, judgment is given for the lessee of the heir of the surrenderor. If we look to the reason of the thing, we may conclude, that any thing that expresses the lord's consent to the surrender, should amount to an admittance; for it is his consent only that is

(e) [See *ante*, 275. (g); and next page N. CXXX.]

(f) [See *ante*, 278. and *post*. next page; and see further of Implied Admissions. *Fisher on Copyh.* 154. *Vin. Copyh.* (E. b.) *Calsth.* 62, 3.]

requisite after the surrender, to make the surrenderee a tenant; and what matter is it whether that be done by a *dominus concessit & admissus est*, or by any act that amounts to as much? There is a case in *Rolls* too, where the surrender of a person before admittance, and acceptance of the lord of the surrender, was construed to be first an admittance, and then a surrender; for the lord, by accepting the surrender, implies he admits him able to make one (g). And by the same reason, that the acceptance of a surrender before admittance amounts to an admittance, the admittance of such a surrenderee's surrenderee is a good admittance of the first surrenderee (g). If a fine be accepted of one as a copyholder, this amounts to an admittance. Accepting rent from the hands of the two tenants into whose hands the surrender was made, doth not amount to an admittance of *cestuy que use*, because the lord may receive it of them without designing thereby any thing to a third person; but if he takes it from them as from *cestuy que use*, it is an admittance. This is the same case as that reported by *Croke*; but *Croke* reports it, that acceptance of rent of *cestuy que use* is no admittance; *Rolls*, that it is an admittance (the lord knowing of the surrender). *Bulstrode* reports it as paid by the two tenants, into whose hands,

1 Rol. Abr. 505.

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3 Bulst. 237.

3 Bulst. 215.

(g) [See N. CXXX.]

&c. and then says, it is no admittance; but if he had shewn that the lord had accepted the rent as of his copyholder, then he saith it had been a good admittance.

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1 Inst. 59. b.
Cro. Car. 536.

1 Ld. Raym.
658.

1 Leo. 288.

Lessee for life, years, or will, of a manor, accepts a surrender, and then his interest determines, the next lord shall be compelled to admit. It seems if a steward have his office *exercend. per se vel sufficient. deput.* (b) he may exercise by deputy, though there be no custom. *Sed quære?* but if that clause be not in, it seems he cannot make a deputy, because it is an office of trust (i): But any act of service may be done by one as servant to the deputy, *a fortiori* to the steward, as to take surrenders, make grants by copy, and admittances (k).

Poph. 127, 8.

The entry of *compertum est per homagium* doth not make an admittance, for that only shews there was a surrender, but implies no assent to the surrender; but the entry of *dat domino pro fine & fecit domino fidel. & admisit* that is the admittance. It is said that in this case the surrender was presented, and the surrenderer accepted, and a copy granted him,

(b) [Of if a grant of stewardship be to a person and his heirs, or to him and his assigns. See 2 Brownl. 337. and post. 314.]

(i) [See Co. Copyh. f. 46.; and see also 1 Hen. Blackst. 163. See too Vin. Steward (I & K). and post. 320.]

(k) [See Cam. Rep. 84. 1 Lord Raym. 658. 1 Salk. 95. post. 314. etc.]

and he surrendered again; and this surrender was presented, and a copy granted, and he accepted as a copyhold tenant. In this case nothing is said to be resolved, but the court said that he, to whose use the surrender is made, had not any estate before admittance; but they said nothing to the point, whether he were admitted, or not. [285] But it seems that in that case there is a very good admittance; for he was accepted as tenant; and I should think it was that made him tenant, and not the entry of it in the roll.

If one who hath a *tortious* estate takes a surrender, and his estate end before admittance; *quare*, Whether the right owner shall not be compelled to admit, since he is compellable to take such surrender (l) ?

A copyholder surrenders to the use of another ^{a Sid. 37. 61.} and his heirs, the *cestuy que use* dies before admittance, his heir being beyond sea; one comes and is admitted in the name of the heir, who consents; this is a good admittance (m). But it seems the lord is not compellable to admit by another, because the corporal service of fealty is due to him (n). If a surrender be to the use of J. S. and J. N. is admitted, and J. S. consents, this is a good admittance; *quare* of it (o) ?

(l) [See 4 Co. 24. a. and *ante*, 198; and 257. N. CXX.]

(m) [See *ante*, 252. N. CXIII.]

(n) [See *ante*, 216. (g).] (o) [See N. CXXXI.]

2 Leo. 200.

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A copyholder in fee dies, his heir enters and makes a lease, the lessee may maintain *ejection firmæ*, without the admittance of his lessor (p), or presentment that he is heir. But it was held in the same case, that thirty years having incurred between the death of the copyholder and the making the lease, that being his own default, should hinder him of the power of making the lease, had he not shewn good matter to have excused the default. The reason of this seems to be, because the law casts the estate upon him by descent, and so enables him to make a lease, lest otherwise there being no court held in a great while, he should lose the profits of the lands; and so the law casts the estate upon him, and helps out the defect of an admission; but yet only *pro tempore*; and therefore the heir must be admitted; for an estate at will is not in itself descendable; therefore where the heir is guilty of a supine negligence, the reason for the law's casting the estate upon him ceases, and it will reckon no estate in him, and consequently he cannot demise (q). That which excused the admittance for nineteen years, was non-age in the heir; for it was resolved that the heir during his non-age, was not bound to

(p) [See *ante*, 162. (x); and see also *Bull. Ni. Pri.* 107. where it is said, that he can only make a lease to try his title before admittance.]

(q) [See N. CXXXII.]

pray admittance, or tender his fine (*r*). And if the death of the ancestor be not presented, nor proclamation made for the heir to come in, &c. he is not prejudiced, though he be of full age (*s*). 4 Leo. 30, 31.

A copyholder of inheritance of a manor of the king's is ousted; no estate is gained hereby to the wrong-doer, but only a bare possession. My lord *Coke* says, peradventure if a copyholder Co. Cop. 104, 5. languishing *in extremis*, surrenders out of court [287] to the use of his cousin, or to any other upon consideration of affection, blood, or the like, and recovers his health before presentment, this surrender is revocable (*t*); but by his saying a surrender out of court, it seems, if it were made in court, that it were not revocable, for then he shewed a more settled design; and by his saying before presentment, it seems that if it were presented, it were not revocable (*u*); for then the land is bound. By *Wray*, if a copyholder sur- 1 Leo. 108. render *in extremis* to the use of himself for life, &c. this surrender shall stand, because of the estate reserved to himself. This seems plainly to warrant the aforesaid opinion of *Coke*.

The lord may avow upon the heir for rents and services before admittance (*w*), but he is not Co. Cop. 112. Mo. 272. cont.

(*r*) [See *ante*, 230, 1; and see also *stat.* 9 *Geo.* c. 29; and *post.* 293. N. CXLIV.]

(*s*) [See *ante*, 230, 1. 1 Leon. 100. Ca. 128. 3 Ibid. 221. Ca. 294. acc.]

(*t*) [See N. CXXXIII.]

(*u*) [See N. CXXXIV.]

(*w*) [See N. CXXXV.]

Moore, 272.
1 And. 192.

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complete tenant before admittance (*x*); for he cannot maintain a plaint in nature of an assise before admittance (*y*); but, it seems he may have assise of Mortdancestor upon his ancestor's admittance (*z*). *Quære*, Whether a feme be so seised to make her husband tenant by the curtesy before admittance, where the custom is for tenancy *per* curtesy (*a*)? It seems reasonable it should make the husband tenant *per* curtesy, as well as the possession of the brother before admittance make the sister heir; and by the same reason the widow shall have her widow's estate, though her husband was not admitted (*b*).

(*x*) [But he has title against every one but the lord, as well before as after admission. See 2 *Durnf. & East*, 197, 8. and *ante*, 163. N. LXXV.]

(*y*) [*Kitch.* 60. *a. & b. Co. Copyb.* f. 41. *Tr.* 94. and see *Moore*, 272. *Ca.* 425.]

It is said that he shall not be sworn on the homage before admission (*Kitch.* 87. *b.* and *Co. ubi sup.*). But surely, if an heir were sworn on the homage, would it not be an admission in effect? What could more strongly confess him a tenant?

(*z*) [See *Co. Copyb.* f. 41. *Tr.* 94. *contra.* And *quære*, Whether such plaint in nature of a writ of *Mort d'ancestor* ever lay of copyholds? See *F. N. B.* 122. (1), & n. (c). 3 *Bl. Comm.* 134, 7. c. 10. 1 *Bl. Trañs.* 122; citation from *Brañon*, (*Vide Brañ.* lib. 1. c. 11. f. 7. *a.*)]

(*a*) [That the husband in such case shall be tenant by the curtesy, See *Moore*, 271, 2. *Ca.* 425—597. *Ca.* 813. and *Watk. on Desc.* c. 1. f. 2. p. 53. n. (8).]

(*b*) [See *Hutt.* 18. *Hob.* 181. 244. *Watk. on Desc.* c. 1. f. 2. p. 53, 4. notes. 1 *Roll. Abr. Copyb.* (M). 502. pl. 1. *acc.*]

If there be a custom to surrender out of court into the hands of two customary tenants, a surrender to the heir of a copyholder before admittance is good. If a copyholder of inheritance surrenders this to the use of another, and his heirs, and the surrenderee die before admittance; *quære*, Whether his heir be in by purchase or descent? It was the opinion of justice *Newdigate*, that he was in by purchase; and according to this is *Rolls*. But the opinion of *Glyn* was, he was in in nature of a descent; and so are some other opinions that are more late (c). Therefore it was held, if land of the nature of borough *Englisb* be surrendered to one and his heirs, and he die before admittance, that the youngest son shall be admitted; and this opinion seems to be very reasonable, for *beirs* were in the limitation certainly as words of limitation, and not of purchase; and certainly there is as much reason to adjudge the heir in by descent here, as there is to adjudge an heir in by descent where a recovery was had against the ancestor, but not executed till after his death; because the use might have vested during the life of the ancestor; and because the execution hath a retrospect; and in truth the case of a surrender is just the same, for admittance might have been in the life of the

1 Keb. 25.
1 Ld. Raym.
76.

2 Sid. 37. 61.
1 Rol. Abr. 627.
807.
1 Mod. 102. 162.

Quære, & vide
1 Rol. Abr. 502.

2 Ld. Raym.
1026. 28.

1 Co. 106.

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(c) [See *Watk. on Desc.* c. 1. s. 1. p. 20. and the books there referred to, *acc.*; and see also *ante*, 220. (u).]

ancestor; and when it was had, it had a retrospect (*d*).

Winch, 3.
3 Leo. 9.
Dyer, 251. a.

One jointenant copyholder releases to his companion; this is good, because both were admitted to the whole (*e*). A copyholder in fee surrenders into the hands of the lord, to the intent the lord should grant them *de novo* to him for life, and then to *J. S.* his wife, during the nonage of the son and heir of *D.* the copyholder, then to the son in tail; the copyholder died, and then the lord granted the lands accordingly to the wife, during the nonage of the heir, he being then but five years old; the wife took another husband and died; the husband by the opinion of two judges was to have the land during the nonage of the heir, without any new admittance (*f*); if so, then it seems he shall pay no fine, for a fine is due upon the admittance (*g*). By the same justices, if there be a copyholder for years, and he dies, his executors shall have the term without any new admittance. But *Weston* to the contrary. But however the opinion seems reasonable, for [290] they continue the possession of the testator, and have it only to his use (*h*).

(*d*) [Of the relation of the admittance to the surrender, see 5 *Burr.* 2785—7. and *ante*, 163. N. LXXXV. 218. N. XCIV.]

(*e*) [See *ante*, 157. N. LXIX.]

(*f*) [See N. CXXXVI.]

(*g*) [See *ante*, 218. (*l*); 219. (*o*.)]

(*h*) [See N. CXXXVII.]

Cestuy que use cannot enter or have trespass Cro. El. 349. against any body without admittance, unless there be a special custom for it. There is a case in *Yelv.* 16. where it is said upon motion to the court, it was agreed by the four justices, that if a copyholder surrenders to a stranger, and the steward will not admit him, and the stranger enters and occupies the land, and the lord lets to another to try the title, and he brings ejectment, the occupier may plead Not guilty, and it shall be found for him (i); and then the report of the case goes on, and it is said, *quare rationem?* for if it be in respect of the possession, it seems the title of the lord is elder, by reason he has right and title to the freehold, &c. and then it is said, *quare*, Whether the reason be not because the lord is *particeps criminis*? for it shall be intended that he would not let the steward admit. Then the report goes on and says, *Nota*, the surrender was but of a copyhold to him, & *tribus assignatis suis*, so that by his death the estate in the copyhold determined, &c. This is a very strange report, for the *queres* and reasons of the case confound it. It seems to me, that the reason of the case was, because that after the surrender, the estate continued in the surrenderor, and not in the lord; and so the possession of the surrenderee was illegal against the surrenderor; yet it was

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(i) [See N. CXXXVIII.]

Tothil, 65.
 1 Roll. Rep.
 125. 195.
 2 Bulst. 236.
 Cro. Ja. 368.
 Mo. 842.
 1 And. 192.
 1 Sid. 58.

good against every body else, and so against the lord's lessee; for when the lord refuses to admit, the way is to compel him in chancery; and no action upon the case lies against the lord for non-admittance (*k*). It is said in *Lex Cust.* 158. that an action lies for the surrendoror; *sed quære* (*l*)? Indeed the reason given was, because the surrenderee hath no interest which the surrendoror hath. It seems, if a man enter into his wife's lands, and makes a lease, and she dies before admittance, yet the lease made is good (*m*). The issue in the case between *Wheeler* and *Honor*, was, Whether the fine to be paid by copyholder was certain or uncertain? and the verdict was, that they were certain. In this case it was held by two justices, and denied by no body, that debt lay for the lord for his fine (*n*). It seems it lies in any case; for the verdict finding that copyholders ought to pay a fine certain, did not any more entitle the lord to his action of debt, than he was before: and it seems to me, that if upon demand he refuses to pay the fine, it is a forfeiture (*o*). It is made a *quære* in that case, Whether if a copyholder in fee die, and his heir waves the possession, and

1 Sid. 58.

Stra. 447.

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(*k*) [See *ante*, 157. N. LXXII. 163, N. LXXV.]
 (*l*) [See *ante*, 157. N. LXXII. *Lex Cust.* c. 17. p. 162. where it is said to be so resolved in Galloway's case, 26 *Eliz.*]

(*m*) [See N. CXXXIX.] (*n*) [See N. CXL.]

(*o*) [See *ante*, 218, 219.]

refuses

refuses to be admitted, whether the lord shall have debt for the fine? and the reporter thinks he cannot wave the possession, which to me it seems he may do in court of record, or in that case of copyhold lands in the lord's court; and if he may do it, then no fine is due (*p*).

Coke says, treating of fines, that some be by 1 Inst. 59. b. alteration of the lord, and some by alteration of the tenant; but that a custom to pay a fine at every alteration of the lord (*q*) is not good; but a custom to pay upon the death (*q*) of every lord is good. *Quare*, Whether a fine be due of common right upon the alteration of the lord by death? it seems it is not (*r*), but only where there is a particular custom for it; though my lord *Coke's* words are general, and may be interpreted either way.

It is said to be resolved in *Keble*, that if the 1 Keb. 15. lord reserve rent upon a lease for years of the freehold of the copyhold, the reservation is not good. The meaning of this must be, either that the lord reserves a rent upon a lease of the freehold of the copyhold lands, or else that he reserves the copyhold rents to himself, so that the lessee shall not have them; in both which [293] senses the case seems unreasonable; for in the last sense I can see no reason why he should not reserve the rents as rents-seck to himself; and

(*p*) [See N. CXLI.]

(*q*) [See N. CXLII.]

(*r*) [See N. CXLIII.]

in the other case surely the reservation must be good, for it seems to be a grant of the reversion for so many years; for by force of such lease the lessee will have all the services of the copyholder, and take advantages of forfeitures, in respect whereof a rent may be reserved. Therefore, where it is adjudged that where a lord made a lease for years, to commence after the determination of a copyhold estate for three lives (where the custom was for a woman to have her widow's estate) that the lease should commence presently in point of computation, though not in point of interest; it seems that must be understood of interest in possession, for surely such a lessee shall have the services, &c.

Infant copyholder makes a lease for years, and at his full age accepts the rent, this makes the lease good (s): such a forfeiture shall not bind an infant, no more than if being tenant for life of freehold lands, he makes a feoffment in fee; but if he accepts the rent after full age, then the forfeiture shall bind him, as it seems. It seems the lord may enter for the forfeiture during the nonage (t), and need not stay to see whether the infant will accept the rent or no, for the particular prejudice done to the lord;

(s) [Of making a voidable lease good by acceptance of rent, &c. see *Cowp.* 482. *Jenkins d. Yate v. Church.* See also 3 *Durnf. and East*, 171. and next note.]

(t) [See N. CXLIV.]

Cro. El. 499.
2 Leo. cont.

2 Sid. 165.

4 Co. 27.
Cro. El. 491.
Noy, 92.
Latch. 199.
Rol. Rep. 256.
8 Co. 44.

and if he should stay his acceptance of services from the infant, in the mean time it would be a dispensation for the forfeiture. But then the infant at his full age, by disagreeing to the lease, may avoid the forfeiture. Custom that upon payment of ten years rent, the lord shall license to let for ninety-nine years; and if he will not license, the tenant may let without: adjudged a good custom; yet the licence seems unnecessary here, since it may be done without it (*u*).

Lord of a manor grants a copyhold, rendering rent *præfat. domino & servitia de jure debita & consueta*. This rent shall go to him, his heirs and assigns; *sed quære?* for in case of freehold lands it is extinct by the lord's death; otherwise if the reservation were generally made, and not to him. The reason of the diversity may perhaps be, because of the clause *& servitia prius debita & consueta*, which seems to intend the continuance of the services, during the lease; for else the grant of the copyhold will not bind the heir; and it seems to be the design of the grant of the copyhold to be good during the term. And though less services are reserved than usually were, that thereby the grant may be avoided; yet the intent and purport of that clause *per servitia prius debita & consueta*, seems to be to continue the rent during the estate, because rent was a *servitium*

2 Keb. 344.

2 Rol. Atr. 450.

2 Inst. 47. 2.

[295]

(u) [See N. CXLV.]

prius debit. & consuet. though not so little rent; and if more be reserved, then the rent must be paid also, during the whole term, by force of that clause, because rent used to be paid; and though not so much, yet that being the only rent reserved, and the old services being to be continued by force of that clause, the whole must be paid, for that seems the intent of the parties, and there is no ground for an apportionment. But then if no rent have been used to be paid, *quære* of that? But grants of copy and surrenders are not construed as deeds are, but have a more equitable construction (*w*), and therefore it may be good in such case. This distinction is taken in *Popbam*.

Poph. 188.

[296] A copyholder made a lease for years by licence, the lessee dies; this shall not be accounted assets in the hands of the executor; otherwise if the lease had been for but a year, because this is an estate at common law (*x*), and the other but a customary estate; *sed quære*, Whether the executor be not compellable to pay debts with the profits? for though the estate be not extendable, yet it is unreasonable he should take the profits to his own use, while debts go unsatisfied. It seems by this distinction, that a lease for a year of copyhold lands is extendable; and indeed it may as well be in the hands of a

(*w*) [See N. CXLVI.]

(*x*) [See N. CXLVII.]

creditor

creditor for a year, without the lord's licence, as in a lessee's hands (y). It is true, copyhold lands are not assets in the hands of the heir, for it is nothing but custom that makes an estate at will descendable; and therefore unless there be custom to make them assets, they partake only of the qualities of an estate at will, which is not to be assets; and it is sufficient for the heir to plead *riens per descent*; and therefore the profits of the lands shall not be assets in his hands, because not descendable. But though the term itself cannot be assets in the hands of the executor, for the reason aforesaid; and also because it cannot be extended (yy); yet the profits when received may be assets, for then they are chattels, and partake no more of the nature of customary lands; and therefore it seems reasonable they should be assets in the hands of the executor; *sed quare*.

The lord licenses the copyholder to let for five years, and he lets for three, this is good; so if the lord license the copyholder for life, to let for five years, if the copyholder so long live, and he lets for five years absolutely, this is a good pursuance of the licence, for the limitation is implied by law, and so need not be expressed; but otherwise it is, had the limitation been during the life of a stranger, had the copyholder had a fee. A. hath a licence to

Cro. Ja. 436.
Noy, 127.
Poph. 105.

[297]

Cro. El. 394.
Moor, 50.

(y) [See N. CXLVIII.] (yy) [See N. CXLIX.]

let for twenty-one years from *Michaelmas* last, and he makes the lease to begin from *Christmas* next; this is not warranted by the licence. It was the opinion of my lord *Dyer*, that if a lease be made of freehold and copyhold lands together, rendering rent, that the rent shall issue only out of the freehold, because the lease of the copyhold lands is void, and because they are of no account in law, and so may be compared to a lease of lands and goods; the rent issues out of the lands, and not the goods. But in the case of *Collins* and *Harding*, it was held that the rent issued out of both, for copyhold lands may be distrained upon. This opinion seems very reasonable, for the lease is good against every body but the lord, and is not a void lease; for if the lease were only made of the copyhold lands, surely the lessor has remedy for the rent; and then the joining freehold [298] lands with the copyhold can make no alteration.

Mo. 554.
Cro. El. 607.
622.
1 Roll. Abr.
426.
1 Roll. Abr.
234.

1 Leo. 315.

A copyholder makes a lease by licence for years, rendering rent, and then grants the rent over to another by deed; the lessee attorns; it was held to be a good grant of a rent-seck, but that the grantee could not have debt (x), because he was not privy to the contract, neither hath he the reversion. Lessee for years of a manor grants licence to fell timber; it seems this is good

1 Keb. 26.

(x) [See N. CL.]

during

during the years ; so that neither lessee nor lessor can take advantage of the forfeiture. Not lessor, for thereby the lessee of the manor would lose the services of his tenant ; for he is the lord of whom the copyholder holds, and therefore he must take advantages of forfeitures, if any body can, which in this case he cannot do because of his licence ; but then when his interest is determined, since there is a prejudice done to the inheritance of the manor, it seems the lessor may take advantage of the forfeiture, for the licence determines by the expiration of the years. When a lord grants a licence to fell timber, and then grants his interest over to another, this determines the licence ; for the licence is but a dispensation with the forfeiture, and gives no property ; but the property being transferred to another before the felling, there must be a new licence to fell, because he is not party nor privy to it ; but if the lessee fell timber after such an alienation of the manor, it is no forfeiture ; *sed quære* (a). [299]

If the copyholder make a lease for years by the lord's licence, the lessee may assign over his lease, or make an under-lease for years, without any new licence ; for the lord's interest is discharged for so many years? ; Roll. Rep. 509.

Lord at will cannot give licence to let for years ; for he cannot discharge the lord's interest any farther than his own interest in the manor ; Roll. Abr. 511.

(a) [See N. CLI.]

- goes; and therefore if the lord that gives the licence has but a particular interest in the manor, the licence is determined upon the determination of the lord's interest. The lord gives licence to lease upon condition; the condition is held in *Owen* to be void; *sed quare* (b)? A copyholder makes a lease for years with licence, and before the years expire dies without heir; some are of opinion the lord may enter, because the estate out of which the lease was derived is determined; others say the licence shall be taken as a confirmation (c).
- 2 Brownl. 40. Carter, 6, 7. 22. [300] A copyholder in tail accepts a feoffment; this destroys not the custom as to his issue in tail, for he hath no power to conclude him (d); yet if he commit a forfeiture, and the lord seises, it seems his issue is bound, it being a common and customary way to cut off the entail of copyhold lands (e). If one seised of a manor in right of his wife, let lands by indenture for years, this does not destroy the custom, as to the wife; for after the death of her husband she may demise it by copy again. And by the same reason it seems her heir may; so if tenant for life of a manor lets a copyhold, parcel of the manor for years, and dies, this shall not destroy the custom, as to him in reversion. Copyholder accepts to hold his land by bill, under the lord's hand; this
- Owen, 73.
Poph. 188.
Stra. 1197.
Cro. El. 459.
598.
1 And. 199.
Latch, 213.

(b) [See N. CLII.]

(c) [See N. CLIII.]

(d) [See N. CLIV.]

(e) [See ante, 177. N. LXXXI. and LXXXII.]

determines his copyhold. So if he accept an estate for life, by parol (*f*), if livery be made; otherwise not; for else nothing but an estate at will passes, which cannot merge an estate at will.

If a copyholder releases to his lord, this extinguishes the copyhold (*g*). So if the lord sell the freehold of the inheritance of the copyhold to another, and then the copyholder releases to the purchaser, this extinguishes the copyhold interest. But if the copyholder be ousted, and thereby the lord disseised, and the copyholder releases to the disseisor, this is of no effect. [301] The reason of this seems to be, that though a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's mind to hold the land no longer; for a copyholder is a tenant at will, and therefore, though the possession be not granted, any thing amounting to a determination of the copyholder's will, is sufficient to extinguish his copyhold. So if tenant at will, of freehold lands, grants his estate over, though nothing passes, and the grant is void, yet it amounts to a determination of his will. But then as to the last case of the disseisor, no right to a copyhold estate is extinguished by release, but where the person that hath the copy-

Hutton, 81.
1 KeB. 808.
1 Leo. 102.

Cro. El. 21.

1 Inst. 57. 2.

(*f*) [A feoffment must now be in writing, by the statute of frauds, 29 Car. 2. c. 3.]

(*g*) [See, as to the release of a copyholder, *ante*, 157. N. LXIX.]

4 Co. 25. b.
1 Leo. 102.

Cro. Ja. 169.

[302]

Hut. 87.

2 Leo. 73.

hold estate comes to it rightfully, because of the prejudice the rightful lord would be at ; for in this case he would lose, in his damages against the disseisor, the fine due for admittance ; and there would be a tenant brought in against his will, and an estate at will grantable by surrender only, pass by disseisin and release. This case is not therefore to be compared to the case where tenant for life releases to him in the reversion, this is of no use ; for it cannot be construed to be a surrender (*b*) ; and as a release it cannot operate, and so it is of no effect ; but in our case, if it be but a declaration of the copyholder's intent to be no longer a copyholder, it is sufficient. A copyholder bargains and sells his copyhold lands to the lord of the manor, who is only lessee for years, the copyhold is not extinguished ; for the lessee is lord of the manor, and so the lands are always demisable by copy (*i*). And there can be no difference between this case and where the manor is conveyed away, together with the copyhold at one and the same time. Three sisters copyholders for life *successive*, the eldest tenant in possession takes husband, the lord by indenture makes a lease to the wife, the remainder to the husband, remainder to the second sister, who four days after the making the lease, agreed *in pais*, and then took husband, and entered ; and the first question was, Whether the

(*b*) [See N. CLV.]

(*i*) [See N. CLVI.]

agreement

agreement did extinguish her copyhold estate? And the opinion of the justices seemed to be, it did not; but judgment was given against the younger sister (*k*); for the eldest sister not being dead, she could not enjoy her remainder, that being to commence after the death of her sister. Now this judgment might be given, and the first point be left undetermined; for if her copyhold estate were extinct by acceptance of the remainder, then to be sure her entry was not lawful; and if it were not determined, yet it was held the younger sister's remainder could not take place, because, according to *Margaret Podger's* case, the remainder was not to commence till after the estate for life ended (*l*); *sed quære* farther, Whether the younger sister's remainder be not in this case destroyed? for the estate for life of the eldest sister is utterly gone; for the lord having made a lease, can take no advantage of the forfeiture, and then the remainder not commencing when the particular estate ends, it seems it can never commence; for there is as much reason to destroy contingent remainders of copyholds as freehold estates (*m*); and this is not like the case where the lord seises the particular estate as a forfeiture; for there it

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1 Roll. Abr.
505.
2 Brown. 153.
9 Co. 107.
Lex Cust. 231.
Cro. El. 24.

(*k*) [*i. e.* the younger of the two; the *second* sister, not the *third*.]

(*l*) [See *ante*, 173. 265.]

(*m*) [See *ante*, 263. N. CXXII. and 1 *Foerns*, 469.]

remains

remains (as it seems) to support remainders. Husband and wife, copyholders in fee, the husband obtains of the lord, for money paid, an estate to them in tail; the husband dies, the wife enters and suffers a recovery, the heir enters upon her by force of the statute 11 H. 7. and his entry adjudged lawful; for by her acceptance of the freehold estate, the copyhold was extinct. Custom that copyhold tenements should be to the wife after the husband's death, either for a moiety or intiercy; they escheat to the lord, and he dies; his wife shall not be endowed of a moiety; for they are not copyhold in his hands.

[304]

2 Sid. 29.

2 Sid. 18, 141.
March, 206.

Style, 266.

2 Roll. Abr.

197.

Jones, 449,
cont.

The king, lord of a manor, and having copyhold lands in his hands, grants them to one for life, without taking any notice that it is copyhold land; and it was held that this was no destruction of the custom; but that after the estate for life ended, the lands might be granted by copy again, and that the rule that copyhold lands must be always demised or demisable time out, &c. extends only to common persons, and not to the case of the king; and the reason given was, because the king's grants are not to be taken to a double intent, viz. to pass an estate for life, and to infranchise the lands too. This case came in question afterwards in 1664, and so adjudged; for the jury gave no special verdict, but found the lands to be copyhold, which it seems they would never have ventured

to do, had not the court been clearly of opinion that the custom was not destroyed. But yet it is said in *Lex Cust.* 233. that there is a case in *Rolls* against this. *Ideo quare*, see *Lex Cust.* 79, 80. If a copyholder hath had, time out of mind, a way over another copyholder's ground, and he purchases the inheritance of his own copyhold, yet the way remains. A copyholder marries the lady of the manor, this is only a suspension of the copyhold estate; so if a copyholder hath the manor in execution: It seems to me in this case, that the husband and conusee being lords for the time, may make voluntary grants of their own copyhold lands, as well as of others that come into their hands; for though they are not copyholders (neither are they so when copyholds escheat), yet they have copyhold lands that have been demisable time out of mind, &c.

1 Roll. Abr.
498.
1 Roll. Abr. 938.
Co. Cop. 172.
Heyden's case.
Savil's Rep.

[305]
Cro. El. 7.

Cro. El. 7.

In that case of the husband he and his wife suffered a recovery of the manor to the use of themselves for life, remainder, &c. This was adjudged to be a destruction of the copyhold estate; for then the lands were conveyed by a common law conveyance, and so the custom was broken. If there be three copyholders, and one takes an estate by livery for life, it seems this does not destroy the customary interest of those in remainder (n).

(n) [See N. CLVII.]

J Roll. Abr.
169, 670.
60nes, 243.

[306]

1 Roll. Abr. 106.

2 Leo. 202, 211.

2 Brown. 146.

1 Roll. Abr. 89.

One is seised of a rent-charge by prescription, yet without prescription he cannot distrain (o) the copyholder's beasts; for the copyholders are in by as high a title, *viz.* Prescription. Copyholder for life, the lord lets the manor, with all mines, to J. S. who, living the copyholder for life, enters and digs a new pit, and takes coals and converts them; the copyholder brings trover, and it was held it lay; for that the coals, after they were dug, belonged to the copyholder; *sed quare*, for they are as much parcel of the inheritance as timber trees. If copyholders prescribe to have common in the lord's waste, and the lord destroys the common by putting conies in it, every copyholder may have an action upon the case against the lord. If a stranger puts in his beasts, whereby the copyholder loseth his common, it seems he may have an action of the case against him, as well as distrain his beasts damage-feasant. But if the damage be so little, that, notwithstanding, the copyholder may take his common, then it seems no copyholder can have any action, because the damage is not done to him, but to the owner of the soil. The same law if a stranger dig the turf up; for though he cannot have an action for digging up the turfs, because they do not belong to him, yet if that be the means by which he loseth his common, the loss of his

(o) [See N. CLVIII.]

common is a prejudice to him, for which he may have an action. If a copyholder, by licence, makes a lease for years, and afterwards enters upon the lessee, he is a disseisor (*p*) for he can gain no particular estate. 1 Rol. Abr. 662.

If a copyholder die seised, and the lord admits [307] another, who enters, he is not a disseisor, but 3 Leo. 210. only a tenant at will, because the lord assents to his coming in (*q*).

How emblements shall be disposed of in copyhold cases, see 5 Co. 115. 1 Rol. Abr. 727. (*r*) Lex Cust. 254.
Hob. 215.
Noy, 27. Lord of a manor having a copyholder a lunatick in his custody, grants over the custody to another, who brings an action in his own name; it was held not to be well brought; for the committee hath no interest, but only a bare custody; Ld. Raymond,
189.
Moor, 512. and therefore the action ought to be brought in the lunatick's name; and by the same reason, the lord himself could not bring an action in his own name; for if he had interest himself, he might have assigned it over. This being a bare custody, the grant by the lord could be no enfranchisement of the lands.

It was held by *Hobart*, that the lord of a manor *de communi jure* hath not the custody of a lunatick's lands; but there must be a custom to warrant it. But it was resolved in the case be- Cro. Jac. 105.

(*p*) [*Per Coke: i. e.* he is a disseisor of the lord in whom the frank tenement was: For of the freehold only can there be a disseisin. See 1 Roll. Abr. 662. *Disseisin* (1), pl. 7.]

(*q*) [See N. CLIX.]

(*r*) [See *ante*, 250.]

[303]

tween *Evers* and *Skinner*, that the lord should have the custody of one that was *mutus & surdus*, and no custom was laid ; and the question was between the *prochein amy* and the lord ; and the reason given why the lord should have the custody is, because otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom, as where there is. And if the custody of one that is *mutus & surdus*, of common right belongs to the lord, by the same reason of one that is lunatick ; *Ideo quære*. If there be a custom (s) in a manor that the lord shall enter and enjoy (t) the lands during the nonage of the infant, it is a good custom ; for the freehold of the land is in the lord (u), and he is tenant to the *præcipe* (u). And an estate at will may cease for a time, and revive again, as well as it may descend by custom.

1 Leo. 266.
1 Co. 87. a.

Cro. El. 324.

Stra. 786.

A lord of a manor may avow for the rent or service of his copyholder, in any court at *Westminster* ; for he has an estate at common law in the rent, and not a customary estate ; and it is due to him upon the same grounds and reasons in law as the rent of freehold lands is.

1 Roll. Abr.
374.
1 Sid. 53.

Fines for admittances and copyhold rents are arrear, then the lord sells the manor ; he is *sans*

(s) [See N. CLX.]

(t) [See N. CLXI.]

(u) [See *ante*, 156. N. LXVIII. and see also 2 *Vern.* 243. *Ca.* 228. 3 *Atk.* 12. *acc.*]

remedy,

remedy, both in law and equity; *sed quære (w)*, for debt lies for a fine, and if it be a duty, surely the passing away the manor will not make it cease to be a duty. *Quære*, Why he shall not have debt for the rents due by the copyholder, and whether the lord hath not a freehold in them?

Carthew, 91,
92.
[309]

Copyhold lands are only impleadable in the lord's court; for the common law doth not take notice of such base estates; therefore if an erroneous judgment be given, no writ of false judgment lies, but only a petition to the lord in nature of false judgment, or else the party grieved may have remedy in chancery (x). One recovers in a manor, no precept can be made to take the *posse manerii*, and give the party possession by force; for the law will not suffer any body to take such power into their hands without the king's writ.

Cro. Jac. 559.
1 Inst. 60. a.
1 Roll. Abr.
373.

3 Leo. 99.

Copyholder's lease is no disseisin to the lord. 2 Keb. 598.
2 Brown. 40. contra. 1 Brown. 133. (y)

If one surrenders to the lord, to the intent he should grant it to another, and he admits him,

(w) [See *ante*, 291. N. CXL. and see 3 P. Wms. 150. 3 Burr. 1717. and note (1) to Co. Litt. 57. b.]

(x) [See 1 P. Wms. 330. Show. Parl. Cas. 67. 1 Eq. Abr. 121.]

(y) [1 Brownl. 133. is also *contra*, per Cur. so *ante*, 215. But see *ante*, 231. acc. and Vin. Copyh. (D. e) pl. 2. acc. cites Noy, 92. and Lat. 199. per Cur. and in 1 Salk. 186, 7. it was held by three justices to be no disseisin.]

this is good; for the other may plead it as a grant.

Lit. Rep. 175.
1 Roll. Abr.
652.

Felv. 2.
Cro. El. 784.

[310]

Copyholder may prescribe in his lord, being a spiritual person, to be discharged of tithes (z).

If a custom be altered by consent of lord and tenants, it seems chancery will compel them to stand by that alteration. *Quare*, Whether it will reduce a fine incertain into a certainty, at the suit of all the copyholders? for though there be an equity in moderating an excessive fine, yet it seems there is none to reduce an incertain fine to a certain one, at the suit of the tenants (a). If a copyholder commit a voluntary forfeiture, there seems no equity in relieving (b); copyholders must be relieved in chancery for their common (c). Chancery will compel to let a tenant sue at law, without a forfeiture. So it will compel a licence to let, and also to admit a mortgagee to try a custom at common law. After forty-three years possession, a defendant was ordered to admit of a surrender and admittance. *Lex Cust.* 326.

Lex Cust. 319,
320.

Toth. 108. 65.

2 Keb. 357.

Lex Cust. 323.
327.

Copyholder for three lives covenants, in consideration of money paid, to surrender, and dies before surrender, and purchaser dies; it was agreed the heir of the copyholder should sur-

(z) [And see the case of *Stephenson v. Hill*, 3 Burr. 1270. as to customary tenants also.]

(a) [See N. CLXII.] (b) [See N. CLXIII.]

(c) [See *ante*, 224. N. XCVIII.]

render to the purchaser's heir, and make good the assurance (*d*). See other good cases, where chancery will and will not relieve in copyhold cases, in *Lex Cuss.* from *p.* 323 to 331. *Moor*, 552. *Totb.* 107.

Copyhold lands cannot be exchanged by deed, [311] but there must be a surrender and admittance thereupon. A right to a copyhold may be extinguished by a release, but no estates can pass by release (*e*); nor by lease and release, though the lease be by surrender; for a release cannot enlarge a copyhold estate (*e*). Co. Cop. 97, 98.

Commissioners of bankrupts bargain and sell copyhold lands (*f*); the estate is in the bargainee before admittance, though he may not enter and take the profits before admittance, which the statute ordained as a cautionary remedy for the lord for his fine. Therefore, if there be a custom in a manor that if a copyholder die seised of a customary estate of inheritance, that the wife should hold the lands for her life; and such a copyholder becomes a bankrupt, and the commissioners bargain and sell the lands by deed indented and inrolled, and then the bankrupt dies; the wife shall not have her widow's estate; for her husband did not die seised (*g*). My Cro. Car. 569.

(*d*) [2 *Vef.* 631. *Hinton v. Hinton, acc.*]

(*e*) [See *ante*, 157. N. LXIX.]

(*f*) [See 1 *Atk.* 95. *Drury v. Mann.*]

(*g*) [See N. CLXIV.]

Co. Cop. 102.
Winch, 57, 67.
3 Bullt. 80.

lord *Coke* says, that the word *Surrender* is *vocabulum artis*; *ergo*, where a surrender is necessary, no other word will supply the want of it; as the words, *Give, Grant*, or the like; *sed quære* well of this matter; for in *Bel-field* and *Adams's* case, it is held that any words expressing his intention of surrendering are good enough (*b*). And this saying of a copyholder in court, was held to be a sufficient surrender, *viz.* that he was weary of his copyhold, and, requested his lord to take it again. See *Lex Cust.* 103, 104. Lands were appertaining to a house, and the copyholder surrendered the house *cum pertinentiis*; adjudged the lands did not pass (*i*).

Hutt. 81.
Cro. Jac. 526.

Cro. El. 717.
Co. Cop. 124.
1 Co. 46. b.
Winch. 3.
Co. Cop. 12, 68.
2 Roll. Rep. 236.

Examination of a feme covert, by the steward out of court, though it did not appear that he was steward by patent, or that there was any custom for such an examination, was held to be good (*k*).

If the king grant *omnes terras dominicales manerii de W.* the customary lands held by copy do not pass, but in the case of a common person they do. It is said in *Lex Cust.* 92. to be adjudged that if a man grant all his demesne lands, his copyhold lands will not pass, if he has other

(*b*) [See *ante*, 252. and 301. N. CLV.]

(*i*) [But see *Touchst.* 94. and the books there cited in n. (*b*); and see also 2 *J. Blackst. Rep.* 1148. *Doe dem. Lempriere v. Martin*; and 1 *Lev.* 131. *Archer v. Bennett*.]

(*k*) [See *ante*, 277. (*x*).]

lands to satisfy the words of his grant. It seems this must be understood of those lands that he holds by copy, or else it thwarts the case before; and the reason is, because copyhold lands do not pass by such conveyance, but by surrender. If copyhold lands escheat, and are in the king's hands, and he grants *omnes terras suas dominicales*, *quare* if they shall pass. It seems every thing demisable by copy must be parcel of the manor (*l*); for the custom can only extend to the manor, and the pleading is *quod infra manerium*, &c. [313]

Lord of a manor grants the stewardship to *S.* Ley's Rep. 47. for life, and after becomes lunatick, and the custody is committed to *A. B.* and others; they cannot by their steward grant estates by copy; Hob. 215. for they have no estate in the manor, and therefore are not *domini pro tempore*; but the lunatick by his steward may grant copies. Tenant Co. Cop. 86. in tail of a manor discontinues and dies, and then the discontinuee makes voluntary grants; these may be avoided by the issue in tail; for the estate of the discontinuee is defeasible and tortious (*m*).

Guardian in socage may hold courts in his own name, and may grant copies. *Lex Cust.* 88. (*n*) Owen, 1:5.

(*l*) [See 3 *P. Wms.* 10. 4 *Durnf. & East*, 443. *Moor*, 143. *Ca.* 285. and *ante*, 212. N. XC.]

(*m*) [See *ante*, 198.]

(*n*) [1 *Roll. Abr.* 499. *Copyh. (C)* pl. 4. 1 *Lord Raym.* 130. *Hargr. n.* (3) to *Co. Lit.* 58. b. acc.]

Cro. Ja. 55, 98.
 1 Inst. 61. b.
 Co. Cep. 124.

1 Leo. 227.

[314]
 Cro. El. 48.

If one be retained steward by parol, it is good to make him steward at will ; and as to all points he is as effectual a steward as one retained by patent. There is a difference taken in the case between *Blagrove* and *Wood*, between the steward of a manor and the steward of a court ; for that the steward of a manor may take surrenders out of court, but the steward of a court cannot. But this distinction is taken no where else, and seems to have no authority in it, being only affirmed by one counsel, and denied by another. Lord of a manor makes a steward *ad exequend. per se vel sufficient. deputat. suum*, who makes *A.* his deputy *hac vice (o)*, to take a surrender of baron and feme to the use of baron and feme for their lives, the remainder over in fee, & *ulterius ad faciendum quantum in me est*. *A.* takes a surrender from the baron and feme, upon condition the lord shall grant it to them for their lives, the remainder over in fee. In this case it was agreed that this deputation *pro hac vice* was good, and that the surrender was good enough (though the authority was to take an absolute surrender, and this surrender was conditional) by force of the words & *ulterius ad faciend.* The force of these words seems to me to be, that the deputy shall take any thing upon him that the steward might, to make good that thing he was to do ; and they do not seem to give him an

(o) [See *ante*, 284.]

authority to take any other surrender than to the uses limited in the deputation. This case is strangely reported by *Leonard*; for there the clause & *ad ulterius*, &c. is not put in, and the surrender was upon condition to pay money, which seems clearly out of the authority the deputy had. 1 Leo. 289.

A steward *ex officio* may make voluntary grants. *Co. Cop.* 124. Auditor and surveyor for the county of *N.* appointed a steward for one of the manors *pro illa vice*. Adjudged they had no authority to do it; *sed quare*, if they may not retain a steward by patent. Things of necessity done by a steward, though he have no authority, are good; as admittances upon descents or surrenders; but voluntary grants are not good by such a steward. If a lord command his steward not to grant such lands by copy, and he doth it, it is void (*p*). So if in his grant he diminish the ancient rent and services (*p*). It is held by *Coke*, that if an infant is not capable of the office of steward of a manor, either in possession or reversion; yet there is a case where the grant of a stewardship to an infant in reversion *exercend. per se vel suff. dep. suum*, was held good. And it was held there, that if that clause were in, *exercend. per se vel suff. dep. suum*, the grant was good, unless he were of such tender years as not to be able to [315]
Cro. El. 699.
Co. Cop. 126.
4 Co. 30.

1 Inst. 3. b.
[and N. (4).]

Cro. Car. 556.

(*p*) [See *ante*, 221. (*x*) and (*a*).]

Co. Cop. 129.

[316.]

Co. Cop. 125.

make a deputy. My lord *Coke* allows that an infant, that has the office of steward by descent, may make a deputy, though the clause of *per se*, &c. be not in. *Sed quære*, Whether he may do it if he have it by purchase? The case in *Co. Lit.* and *Cro. Car.* seems to be against this.

Coke says, the law is not very curious in examining the imperfections of the steward's person, nor the unlawfulness of his authority; for be he an infant, *non compos*, lunatick, outlawed, or excommunicate, yet whatsoever things he performs as incident to his place, can never be avoided for any such disability, because he performs them as a judge; at least, as custom's instrument. By this my lord *Coke* seems to allow that an infant is capable of the office; for were the grant to him void, then voluntary grants made by him would not be good; which yet my lord *Coke* seems to allow, when he saith, that whatever things he performs, as incident to his place, can never be avoided; and one incident to a steward's place, is to make voluntary grants; and he seems indeed to put him in the same place with a lunatick person; and a grant by him is, without all question, good. It may be meant here, where the infant has the office by descent. However it be, it seems clear that an infant is capable of the stewardship *exercend. per se*, &c. and where he is of years of discretion, perhaps he may exercise it himself; for it was said in the case of *Young ver. Fowler*, that

Cro. Car. 556.

the infant in that case, being eleven years old, was able to exercise the office himself, or make a deputy ; and something there is darkly expressed, which yet seems to intimate that he may execute it himself. As for the authority of the steward, saith my lord *Coke*, though it prove but counterfeit, if it come to exact trial ; yet if in appearance, or outward shew, it seems current, that is sufficient.

If a grant be made to one, and through some defect it is avoidable ; yet the courts kept by such a steward, before avoidance, shall stand in force ; and whatever he did as steward, is for ever good. This seems very reasonable, and doth not at all thwart the distinction taken before ; for there the steward had no authority ; and so only necessary acts by him are good. But here he had authority, and was to all intents and purposes steward, till the avoidance ; and so all acts, by him done, shall bind. And perhaps this may be the reason why the acts of an infant are unavoidable, that the grant is not actually void, but only voidable ; and so before the avoidance of the grant, he is absolute steward. My lord *Coke* is so far from overthrowing the aforesaid distinction, that he takes the same himself ; but adds farther, that one that has no manner of pretence nor colour for keeping of courts, if he assumes the steward's place, whatever he does will not be void, especially if a precept be given to the bailiff to give him

Co. Cop. 125. b.

[318]

him warning, which seems very reasonable; for the faint authority of the steward is allowed in other cases, for the security of purchasers, who can never know the steward's right; and no harm is done to any body, the case standing indifferent between vendor and vendee. Therefore where harm would be done (as where the lord's lands and property are disposed of by voluntary grants) there such steward can do nothing. But when a steward hath no pretence of title, there every body must take notice of his wrong; for if they were not obliged, it would be impossible for the lord to do any thing according as he thought fit; for any stranger might thrust himself into the employment, and introduce whom he pleased to be tenants. As the law doth not examine the imperfections of the lord from whom the interest passes; so neither doth it examine the steward's, who is restrained by law from prejudicing the lord. And as the disseisors, &c. may do necessary acts, so may those stewards who have as little title as disseisors.

[319]
 4 Co. 26. b.
 Co. Cop. 128.
 and 121. cont.

My lord *Coke* says (*q*), that the lord may make admittances and grants by copy at what place he pleases; but the steward of the manor, at any court held off the manor, (for out of the court, it is said by him in another place, he may make admittances and grants by copy,)

(*q*) [See *ante*, 250. N. CXI.]

cannot

cannot make any admittances or grants by copy. This seems to imply that the lord may make by copy grants and admittances at a court held off the manor ; or else where is the difference between the case of the lord and steward ? And in the next case but one, it is resolved that if the steward at a court held off the manor, make any grants or admittances, they are all void ; but he says nothing of the lord. In his comment upon *Littleton*, he says the court-baron must be held upon the manor, else it will be void.

As *Melwich's* case is reported by *Croke*, it is Cro. El. 103. there said, that if the lord grant away the freehold of his copyholds, the grantee may hold courts where he will, to make admittances and grants (*r*). If then a grant by copy or admittance should be made at a court held off the manor, though it be a court-baron, why should it be void ? Since a court-baron contains in it two courts, one for the freeholders, the other for the copyholders ; and since that for the copyholders, as to granting copies, &c. [320] may be held off the manor, there is no reason, that because the court-baron is void, that therefore the admittance should be void ; for they are as two distinct courts ; and the admittance had been good, had the court been only the copyholders court. And if we look back to

(*r*) [See *ante*, 209, &c. 250. N. CXI.]

the reason of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor? for it is no judicial act; if it were, surely it must of necessity be done in court; and therefore it was held *per tot. cur.* that a court to do these things might be held off the manor: It is not distinguished in this case between the grant of the lord or steward: But *Coke* is express that grants by stewards at courts held off the manor are void. *Ideo quare de hoc.*

1 Leo. 288.

Co. Cop. 129.

Noy, 2.

Noy, 29.

[321]

Cro. Ja. 36.
Moor, 758.

A steward cannot *de communi jure* make an under-steward (s), unless he has power by his patent, or be an infant that has the office by descent, or be a person of that quality that it will be a disgrace to him to hold the courts himself; as if he be an earl, &c. Custom that if a copyholder holds lands in fee, and his wife survives him, that she shall have it in fee, & *sic e converso*. And so the custom for an executor to hold for a year after the death of the copyholder, is a good custom, where the wife is to have her *free bench* (t). Copyholder (where there is a custom for the feme to have her widow's estate) makes a lease for years; she shall not avoid the lease (u); for the lease being

(s) [See *ante*, 284.](t) [See *Fish. on Copyh.* 14. c. 2. *Dougl.* 204. *Case of Eastcourt v. Weeks* (cited), and *post.* 324. (g).](u) [See *Cowp.* 481. *acc.*; and see also *ante*, 311. N. CLXIV.]

made according to the custom, his title is as good as hers; but if the lease were made without warrant, then she may. It seems to me, that the feme shall not in this case be endowed of the third part of the rent and reversion, because customs ought to be strictly pursued, and that is only to be endowed of land; yet it seems after the lease ended she shall be endowed (*w*), for the husband did die seised (the possession of his lessee being his own possession). But it was agreed in this case, that by special custom the feme might avoid the lease. This among other cases proves that a copyholder may dispose of his land, and bar his wife of her free bench (*x*), unless there be a particular custom that she shall avoid any alienation, &c. made by him; for then the particular custom shall, as it seems, avoid his charge as well in the case of copyhold as freehold estates, by the common law. Co. Ent. 123.

Lord enfeoffs his copyholder in fee where the custom was, that if a copyholder in fee die seised, his wife shall have frank bank; the copyholder died; adjudged the wife was barred; but had the lord enfeoffed a stranger, she should have had her free bench, because the land remained copyhold, and the custom not taken away. Cro. Jac. 126.
Carthw., 276.

[322]

(*w*) [See *Bac. Abr. Copyh.* (E). n. (c).]

(*x*) [See *Carth.* 276. 2 *Ves.* 633. 2 *Durnf. and East.* 580. *Cowp.* 481. *acc.*]

3 Leo. 81.
Co. Cop. 94.
Moor, 123.
4 Co. 61. b.

It came to be a question in *Skipwith's* case, whether the custom for feme coverts to devise lands to their husbands, or any body else, were a good custom; but judgment was given upon a defect in the pleadings. It was held by all the justices, that copyholds are out of the words of the statute 34 & 35 H. 8. of wills (y); but *Anderson* held them to be within the equity of that statute. *Quare* well, whether such custom be good to devise (z); and see the books cited in the margin.

Winch, 27.

If the husband be attaind of felony, it seems the wife shall lose her dower in the copyhold lands, although there be no special custom (a), for this amounts to an alienation. It is said in *Lex Cust.* 46. that the lord of a manor cannot grant a copyhold in reversion without a special custom. If this be understood where copyholds are only grantable for life, it seems reasonable enough; but where they have been granted in fee, there, if the lord grant to one an estate for life, that he may not afterwards grant the reversion in fee to another, seems very unreasonable (b).

March, 8.

[323]
March, 161.

Custom that if a copyholder do not repair, it shall be presented by the homage, the tenant

(y) [See N. CLXV.]

(z) [See N. CLXVI.]

(a) [See N. CLXVII.]

(b) [See *Cro. Eliz.* 373. *Viner, Copyh.* (P. 3). *Com. Dig. Copyh.* (C. 10—12). 1 *Roll. Abr. Copyh.* (L). *Fisher on Copyh.* c. 2. p. 14, 15. *ante*, 194. (w); 273. (l).]

amerced,

amerced, and the lord shall distrain upon the copyholder or under-tenant; this is a good custom; for the under-tenant is not a meer stranger. Custom, that after the death of tenant for life, the lord is compellable to make a grant for life to his son, and if no son, to his daughter, is a void custom (c); because it obliges the lord who hath the interest, to grant it to this or that particular person, whether he will or no: But a custom for a copyholder for life to nominate his successor, is good; for that is a right and interest vested in tenant for life. *Sed quare* (d).

Moor, 842. 788.
2 Brown. 85.
Noy, 2.
Cro. Jac. 368.

Custom for the steward to make by-laws for the ordering the common, is a good custom. An order made that a tenant should not put in this or that beast is void, because it takes away his inheritance; but if it were that he should not do it before such a day, that is a good by-law, being not restrictive of his inheritance, but only directive of it.

March, 28.

Custom that he that lives about ten miles from the manor, upon paying 8*d.* to the lord, and 1*d.*

Mod. Rep. 77.
1 Sid. 361.
2 Keb. 344-
380. 851.

(c) [See *ante*, 157. N. LXXI. 273. (l); and the next note.]

(d) [See 1 *Roll. Abr.* 560. *Customes*, (E). pl. 18, and 562. (H). pl. 1. (Case of *Rawles v. Mason*, T. 10. *Jac. per Cur.*) *Cro. Jac.* 368. *Vin. Copyh.* (A. e), pl. 7. 2 *Durnf. and East*, 746. 1 *Strange*, 657. *Fish. on Copyh.* 18. From which books it appears, that such custom has frequently been recognized as good in law.]

[324] to the steward, should be excused from attendance upon the court; this is a good custom: if he avers there are copyholders sufficient to keep court that live near the manor (*e*); or else surely the custom will be void; for then no court can be held. As this case is reported by *Siderfin*, it is said it was held a good custom, because the court was a court-baron, where the suitors are judges; but it seems to me to be all one; for that if it were a customary court, if sufficient copyholders were near the manor, it is unreasonable to oblige persons that live a great way off to attend; and if the court be a court-baron, if there be not a sufficient number of tenants that live near the manor to do the duty, then copyholders are obliged to do it in that court as well as freeholders (*f*); and therefore it seems the custom cannot be good, for no court can be held.

Mo. 8.
Noy, 27.

Lit. Rep. 231.
Hutton, 126,
127. 101.

Custom that a copyholder shall not alien without licence is good. That a lessee may hold the lands half a year after the term, is no good custom (*g*). Custom, that if a copyholder make a lease for a year, and die, that

(*e*) [See N. CLXVIII.] (*f*) [See N. CLXIX.]

(*g*) [*“ Per tous les justices.”* Moore, 8. pl. 27. But see Dougl. 201. Case of Wigglesworth v. Dallison & al. and the cases there cited; particularly those of Eastcourt v. Weeks (Lutw. 799. 801.), Lewis v. Harris, and Beaven v. Delahoy (1 Hen. Bla. 5 & 7. n. (*a*); from which it should seem, that such a custom may be supported.)

it

it shall be void against his heir, is a good custom.

Custom was to demise land, the lessee paying the treble value of the rent; and if he died within the term, that his heir should have it, paying one year's rent; and that if he assigned, the assignee should have it, paying a year's rent. This was held to be a good custom. Cro. Ja. 671.

Custom that if a copyholder will sell his land, the next of blood shall have the refusal, or the next neighbour to the east, or the like, is a good custom (*b*). It seems the reasonableness of a custom is to be considered, not from the rules and maxims of common law, (for there is no custom, but what in some point or other overthrows the common law,) but from the conveniency of the thing itself. As if there be a custom that a copyholder shall not put in his beasts to take the common before the lord has put in his; this is a void and unreasonable custom, because it is in the power of the lord by this means to take away the interest of his commoners: so a custom that the tenant shall pay a fine upon the marriage of his daughter is void (*i*), because it is against the freedom of the subject; but if a man obliges himself to such a thing by tenure, it is good, being his own contract (*i*); so a custom may be void for the un- 2 Brown 277.
Co. Cop. 70, 71.
Lex Cui. 34.

Co. Cop. 73.
2 Roll. Abr.
264, 5.

(*b*) [See N. CLXX.]

(*i*) [See *Co. Litt.* 139, 140. *Calth.* 36. *Sulliv. Lect.* xxiv. p. 227. and *ante*, 108. (*k*); 289. N. CXXXVI.]

certainty; as if a feoffment be made by an infant, it shall be good, if he can tell 12*d.* (*k*), or that tenants ought to pay or ought not to pay above two years rent for a fine. Custom of a manor was, that if a man took a customary tenant to wife, and outlived her, he should be tenant *per* curtesy. And a man took a woman to wife who had no copyhold land then, but some descended to her during her coverture; it was adjudged he should not be tenant *per* curtesy, because he is out of the custom (*l*).

1 Roll. Abr.
511.

Custom was, that the lord might *solummodo* grant estates in fee. This word *solummodo* was expounded to mean, that he had only used to grant estates in fee; and so it was held he might grant for a less time; but suppose it had been shewn and pleaded that he could not grant any otherwise; *quære* of that (*m*).

Custom was, that when a copyholder sells his land, proclamation shall be made at the next court-day; and if any of the blood of the vendor will give as much money, he shall have

(*k*) [See *Davys's Rep.* 33. *a. Robins. on Gav.* b. 2. c. 3. p. 223. and the authorities by him cited; and *ante*, *Introd.* xviii. N. I.]

(*l*) [Sir John Savage's case, 2 *Leon.* 109. But this case of Sir John Savage was denied to be law by *Holt*, C. J. and *Powell*, J. in the case of *Clements v. Scudamore*, 1 *Pr. Wms.* 62. 2 *Ld. Raym.* 1028; and in 1 *Salk.* 243. it is said to have been denied by the court.]

(*m*) [See *Cro. Eliz.* 373. See also 1 *Lord Raym.* 999, and *Salk.* 189.]

it (*n*). If the land be sold for money, and any thing else, it seems to be out of the custom. The case was, the land was sold for money, 1 Roll Abr. 568. and in consideration of a cure done to the vendor by the vendee, it was held the next of blood could not take advantage of the custom.

Copyhold is granted to two for the lives of three persons, and tenants *pur auter vie* die, living the *cestuy que vies*; there shall be no occupant, but the lord shall have the estate; for no body can gain a copyhold by occupancy, 1 Roll Abr. 511. Hales accord. Co. Cop. 132, & 155. cont. [327] but by admission of the lord (*o*): But it seems, if the limitation had been to the tenants and their heirs (*p*), during the lives of the *cestuy que vies*, the heir in such case would have the estate (*p*), and not the lord, because he has excluded himself, and expressly granted the copyhold to the grantee and his heirs, during such a time; but then it seems the heir must be admitted and pay his fine. It seems he must only pay a purchase fine, and not such a one as is paid upon a descent; for he doth not take by descent, but by special occupancy (*q*).

Copyholders may have *solam* & *separalem* 2 Sand. 326, 327. *pasturam* in the soil of the lord, and exclude the owner. If a copyholder let for years by Roll. Abr. 338:

(*n*) [See *ante*, 325. N. CLXX.]

(*o*) [2 *Lord Raym.* 1000. *acc.*]

(*p*) [2 *Just. Blackst. Rep.* 1148, *Doe dem. Lempriere v. Martin, acc.*; and see 2 *Durnf. and East*, 746.]

(*q*) [See N. CLXXI.]

licence, this is not extendable in the hands of the lessee (*r*); for the statute which gives execution of lands, extends not to copyholds.

It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines (*s*); neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate (*t*); and the copyholder himself seems to have no interest in the inheritance of the lands. Copyholder may dig for marl to lay upon the copyhold land: He cannot inclose where it was never inclosed before. Copyhold not forfeited or determined by outlawry (*u*). Copyholder shall have aid of the lord, where the right of the feigniory comes in question. If he hath had aid of a bishop, and then the temporalities come into the king's hands, he shall not have aid of the king, because of the delay.

[328]

Lit. Rep. 234.
2 H. 6. 37. 39.

Style, 311.

Custom that a copyholder may give a warrant of attorney to another to surrender after his death, is a void custom.

2 Roll. Abr. 157.

The king grants a manor in fee-farm, the lands and goods of copyholders are not liable to the rent, because they come in by prescription, which is before the rent (*w*). Estates of

(*r*) [See *ante*, 296. N. CXLVIII and CXLIX.]

(*s*) [See 2 *Atk.* 189. 1 *Pr. Wms.* 407, 8. *acc.*]

(*t*) [See *ante*, 305, 6. 1 *Pr. Wms.* 408. *acc.*]

(*u*) [See *ante*, 242.]

(*w*) [See *ante*, 305. N. CLVIII.]

copyholders, confirmed by decree in the exchequer or dutchy chamber, shall be good, according to the said decrees, by the 7 *J. 1. c. 21*. But it seems from the words of that act, that it only extends to those decrees made after the first day of the session of that parliament, and two years next ensuing that time.

A bishop or tenant in tail, &c. lets copyhold lands by deed indented; the issue or successor may grant this by copy again; yet they may make leases according to the statute to bind: though no man can have an action of forcible entry, but he that hath a freehold in the tenements; yet if the lord should forcibly enter upon his copyholder, it seems he may be indicted for it (*); (for if another enters, there is no question but it is a disseisin to the lord;) for it is not requisite to the maintaining the indictment, that he that disseises should gain a freehold; *sed quare*, Whether he that is entered upon must not have a freehold? for the 21 *J. 1. c. 15*. gives restitution of possession to a lessee for years, but no indictment; and had an indictment lain before, that act had been needless; for where an indictment lay, there restitution was to follow.

² Roll. Abr. 197.

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F. N. B. 551.

(*) [Trespas lies against him by the copyholder. See *ante*, 157. (e).]

See of Indictment, 1 *Hawk. P. C.* 278. c. 64. s. 15—17. See also 3 *Burr.* 1702 and 1733.]

Co. Cop. 24.

If a copyholder dies, his heir under the age of fourteen, the next of kin shall not have the custody of the copyhold land; for the right of appointing a guardian for them *de jure* belongs to the lord (z), that so he may be sure to have the services done him. This is a particular reason why the lord should have the custody of the lands, against the common rule for the guardian in socage. But the reason not extending to the custody of the body, it seems the guardian in socage shall have the body. This guardianship, saith Coke, *de communi jure* belonging to the lord, the copyholder cannot by his last will and testament appoint another guardian: *quare*, Whether at this day by force of the statute 12 Car. 2. c. 24. the devisee of a child shall have the guardianship of the child's copyhold lands (a)? For the words of the act, see the statute at large.

Co. Cop. 155.
165.

[330]

Co. Cop. 38.

Copyholders pay no relief, for that is a service only due from freeholders (b). The quality of the lord's estate is not regarded in voluntary grants by copy; for if he be but *dominus pro tempore*, it is sufficient (c); for if baron and feme grant copies, the feme shall never avoid this after the death of her husband; but if he alone grant (d), it seems she may, for

Co. Cop. 79,
80.(z) [See *ante*, 308. N. CLX. *contra*.]

(a) [See N. CLXXII.]

(b) [See N. CLXXIII.]

(c) [See *ante*, 196, &c.](d) [See *Cro. Jac.* 99. *acc.*]

he had nothing but *jure uxoris*. Two joint-tenants of a manor, a copyhold escheats, one may grant the whole, for he is *dominus pro tempore*, and is seised *per my & per tout*. Lord grants a copyhold for life, where they are grantable in fee, the grantee surrenders to the use of another in fee, the lord admits *secundum officium sursumreditionis* (e); an estate for life only passes. If a copyholder surrender to the use of his last will, and by that devises it to two, and the lord admits one, this shall enure to both (f); for when he is admitted, he is in by the surrender, which he cannot be unless he be a jointenant; for that is his title by the surrender.

Co. Cop. 90.

Co. Cop. 97.

A copyholder dies; a stranger before the admittance of the heir comes and surrenders to the use of the heir and his wife; he shall ever claim jointly with his wife by force of this estoppel. If he had been admitted first, and then the surrender had been made, *quare*, Whether he had been estopped (g)?

Co. Cop. 112,
114. f. 41.

[331]

Quare, Whether tithes are grantable by copy? See *Cro. El.* 814. & *1 Roll. Abr.* 498.

(e) [Co. Copyb. f. 34. *Trañs*, 77, and *quare*. For lord Coke only says, "I think no fee passes;" and see *ante*, 255. N. CXIX.; 257. N. CXX. See also *ante*, 120. N. XLV. 273. (m). Of admissions *secundum officium sursumreditionis*.]

(f) [See N. CLXXIV.] (g) [See N. CLXXV.]

where

where it is said they may (*b*), as well as a rent-charge (*i*).

Co. Cop. 116.

Things that lie not in tenure, are not grantable, unless appendant to something that does lie in tenure; for first, no rent can be reserved out of them, because there can be no distress taken upon them, and then they are not parcel of a manor, which consists only of demesns and services. But then it will be objected, that a rent-service is parcel of a manor, and grantable by copy; for a manor may be granted by copy, but a rent-service may be distrained for; and if it be granted by copy, it cannot be granted alone, but lands must be granted with it, upon which a distress may be taken; and as it is part of a manor, it is held of some superior lord.

[332] *Per se* it seems a rent-service cannot be granted by copy, no more than rent-charges, or commons in gross, which yet may be granted by copy, as they are appendant to any other thing. No service can be reserved or due upon the grant of incorporeal things; so that no court can be kept by the grantor, no attendance

(*b*) [*Cro. Eliz.* 413. which cites Sir John Bourn's case as so adjudged. *Moore*, 355. *Ca.* 480. N. (9) to *Co. Litt.* 58. *b.* *Supplem. to Co. Copyh.* f. 17. *Traffs*, 200. *acc.* And note, Tithes are tenements. See 1 *Strange*, 100. and cases there cited; and also *Com. Rep.* 267.]

(*i*) [See below, and *Calth.* 54. *Co. Copyh.* f. 42. *Traffs*, 97. *contra*, as to a rent-charge.]

being

being due from the grantees of incorporeal inheritances ; so as to them there is no lord, and consequently they cannot pass by surrender and admittance, and so are not grantable by copy ; and therefore where *Coke* says, that any thing parcel of a manor may be granted by copy, or any thing concerning lands and tenements, that must be meant parcel of the manor, and no incorporeal things in gross are parcel of a manor.

Things grantable by copy must be things of Co. Cop. 113. perpetuity, for otherwise it can never be shewn that there hath been a custom to demise them by copy ; yet a man may grant by copy twenty loads of wood to be taken by the grantee (*k*) ; for it is not requisite that the grant should have continuance, but that the thing granted by copy, should be a thing of perpetuity, which trees are, for a man may have an inheritance in a tree ; yet it seems no service is due from the grantee in such a case : but then trees while growing, are held ; and a tenure may be reserved upon the grant of them, though no service be due upon the grant of twenty loads ; of which *quare* (*l*).

A steward of a manor cannot license persons [333]
Co. Cop. 122. to alien by deed *ex officio* (*m*) ; for that is no customary thing, but a power derived from the

(*k*) [*Co. Copyb.* f. 42. and *Co. Litt.* 58. b. acc.]

(*l*) [See N. CLXXVI.]

(*m*) [See *Co. Copyb.* f. 44. *Tracts*, 101, 2.]

lord's interest, and therefore belongs only to the lord, unless there be a particular custom for the steward to license, or power be given him by the lord in his patent, or otherwise: Licence to alien and admittance must be in the name of the lord.

Co. Cop. 123.

The same exposition that is made of grants of freehold lands, is made of copyhold lands (*n*); therefore a grant to one and his heirs male is a fee, &c. See *Co. Cop.* 136, 139.

Co. Cop. 143.

Actions merely personal a copyholder may sue at common law. Copyholder makes a lease by licence for years, where the custom is for the copyholder to cut down timber-trees; the lessee for years cuts down the trees; the copyholder shall sue in the lord's court to punish this offence.

Co. Cop. 154.
&c.

A fine is due upon admittance upon a voluntary grant (*o*). Where the custom is for a copyholder's lands to be extended (*p*), the extendor shall be admitted and pay a fine.

3 Leo. 9.

A. intermarries with a feme copyholder for years; he shall not be admitted or pay a fine if he survive (*q*). Two jointenants, the one dieth, the other shall have all by survivorship, without

(*n*) [See *ante*, 295. N. CXLVI.]

(*o*) [See *ante*, 239. N. CIII and CIV.]

(*p*) [See *ante*, 185. 295. N. CXLVII.; 296. N. CXLVIII. and CXLIX.]

(*q*) [See *ante*, 289. N. CXXXVI.]

paying a fine or being admitted (*r*). Tenant for life, and he in remainder join in a grant of their copyhold, but one fine is due (*s*). So if a surrender be made, and after a recovery is had by plaint, in the nature of a writ of entry in the *post*, for the better assurance, but one fine is due (*t*). [334]

Touching waste voluntary and permissive by an infant, a man *non compos*, a feme covert, guardian, *cestuy que use*, see *Co. Cop.* from p. 163 to 171 (*u*).

Tenant for life of a manor, remainder in fee, a copyholder commits a forfeiture, tenant for life dies; he in remainder may take advantage of his forfeiture, in respect of the damage done to his interest (*w*). So it seems if tenant for life had aliened to another his estate, though neither he nor his grantee could take advantage of this forfeiture; yet after his death, it seems he in remainder might. If a copyholder does an act which extinguishes his copyhold, acceptance of rent will not dispense with it. Otherwise, where it is a naked forfeiture (*x*). The lord of a manor demises the land by copy,

Co. Cop. 170, 171.

Cro. El. 581.

(*r*) [See *ante*, 330. N. CLXXIV.]

(*s*) [See *ante*, 163. (*c*); and N. LXXVII. *Co. Copyh.* f. 56. *Traſts*, 130. *acc.*]

(*t*) [*Co. Copyh.* f. 56. *acc.*]

(*u*) [And further, *Fin. Copyh.* (K. c) & (R. c). *Com. Dig. Copyh.* (M. 3, 4, 5).]

(*w*) [See N. CLXXVII.] (*x*) [See N. CLXXVIII.]

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to *A.* upon condition he should pay twenty shillings yearly to *B.* during his minority, and 100 *l.* when he came at age; *A.* doth not pay the twenty shillings yearly, but surrenders to the use of *P.* and his heirs, whom the lord admits; and afterwards *B.* attains his full age, and the money is not paid him; whereupon the lord enters for the condition broken, and grants it to *B.* and the question was, Whether the lord's admittance of *P.* were not a dispensation with the condition? The case was not resolved; but *Fenner* was of opinion it was no dispensation; and he argued that because the lord was only an instrument to convey, and the *cestuy que use* is in by him that surrendered; and therefore the lord's admittance was no dispensation. But surely his affirming the power of the copyholder to surrender an estate after the breach of the condition, for not paying the twenty shillings, is a good dispensation for that forfeiture, as well as if he had accepted rent after the forfeiture; for the affirming his power to grant over his estate, is as much an indication of the lord's mind for the continuance of the estate, as the acceptance. But then as for the forfeiture, that accrued after the admittance (*y*),

(*y*) [That is, the forfeiture on nonpayment of the one hundred pounds. The default in not paying the twenty shillings was supposed to have been purged by the subsequent surrender and admission of *P.*]

It seems the admittance could not pass away that; for the land was charged with the condition, into whose hands soever it came: And this seems to be *Fenner's* opinion, by the reason he gives; for that the *cestuy que use* coming in by the surrenderor, the lord by his admittance did not pass away his interest in the condition; for the question was, Whether the lord had dispensed with the condition, not whether he had dispensed with the forfeiture of the condition broken? for that was not broken *in part*, till after the admittance: yes (z), *a breach in part was a breach of the whole condition.*

[336]

My lord *Coke* says, that presentments of surrenders ought, in all material points, to ensue and agree with the surrenders themselves (a), else the surrender, presentment, and admittance thereupon, will be void; which seems reasonable; for if the presentment in matter differs from the surrender, the lord hath no sufficient notice of the surrender; and then the admittance upon it must in reason be bad, and not help out the presentment; for if the lord knew the true surrender, perhaps he would never consent to such a surrender; and the true surrender ought to be known, that the lord might know his tenant, and from whom to take his services. The admittance cannot help out, for that was grounded upon the pre-

Co. Cop. 105.
4 Co. 25. a.

(z) [Yet.]

(a) [See *ante*, 192. (r).]

A A

sentment;

sentment; but if the lord had notice of the true surrender, though the presentment did differ, yet it seems reasonable the admittance should enure according to the surrender, because he had notice of the true surrender; and when a man is admitted, he is in by the surrender. *[337]* *Sed quære.*—Where it is said, that if the presentment differ in points material from the surrender, that there the admittance, presentment, and surrender, are all void; It seems this must be understood, if the time for presenting the surrender be past; for if there should be a presentment and admittance made contrary to the surrender, sure this will not make the surrender void before the utmost time allowed by law for the surrender's being presented; for it is no reason to say that because the presentment is void, that therefore the surrender is void; for the surrender depends not on the presentment, though it may be void because not presented, but not because ill presented. So that if after such ill presentment and admittance, there should be a good presentment and admittance, it seems the surrender and all the other acts will stand good.

Cro. El. 442.
4 Co. 23. 2.

A. copyholder in fee surrenders to the use of himself for life, then to his son for life, then to the use of his last will; the son dies, then the father surrenders to the use of *J. S.* in fee; adjudged that notwithstanding the surrender to the use of one's last will, the estate remains in

the

the copyholder (*b*), and he may surrender it in his life-time to whom he pleases.

It is said in *Rolls*, that if a copyholder makes a deed of feoffment, with letter of attorney to make a livery, it is a forfeiture, though no livery be made; (*secus*, if there had been no letter of attorney to make livery;) for by giving the letter of attorney he hath manifested the determination of his will, having put it in the power of another person to pass the estate; but when he hath reserved that power to himself, he may choose whether he will pass it or not (*c*).

[338]
1 Roll. Abr. 508.
Co. Lit. 55.

(*b*) [See *ante*, 195. N. LXXXV.]

(*c*) [See N. CLXXIX.]



N O T E S

A N D

I L L U S T R A T I O N S.

NOTE I. Introd. p. xviii. (1).

It should seem that in more early times the age of majority was in both cases the same, and fixed at fifteen.

In rude ages, man, continually exposed to danger, found it necessary to his protection to be continually armed; and as he was to encounter danger at an early period, he took up his arms as soon as he was able to wield them. (See *Adair's Amer. Ind.* 18.) Among a people whose glory was in warlike achievements, the presenting of arms to youth was made a ceremony solemn and important.

In ancient Germany, when a young person was deemed capable of bearing arms, he was introduced into public, and they were solemnly given him in the presence of the chiefs of his nation, &c. He from thence became a citizen, a member of the state; and from this custom is derived the ceremony of knight-hood. (See *Tacit. de Mor. Germ.* c. 13. and *Cæs. de Bello Gall.* lib. vi. c. 16. See also *St. Palaye, passim. Seld. Tit. of Hon.* p. 2. c. 1. f. 58. *Works*, n. 3. p. 491. 1003, *Spir. Laws*, b. 18. c. 26.

Stuart's View of Soc. in Eur. b. i. c. 2. s. 4. p. 47, 8. 269, &c. n. (3). *Lacombe, Abrégé de l'Hist. du Nord*, tom. 1. p. 386, 7.

The forms of creation with respect to knighthood, and the terms which were used to express that ceremony in later days, had allusion to the customs of earlier times. "*Willelmus rex fortis anno decimo nono regni sui, cum de more tenuisset curiam,—ad Pentecosten apud Londoniam, Henricum filium suum juniorem VIRILIBUS INDUIT ARMIS.*" *Hen. Hunt.* l. 6. p. 370. *Nu.* 20.

"*Rex Wilbelmus in festo Pentecostes apud Westmonasterium—Eodem tempore per prius Henricum filium suum juniorem CINGULO DONAVIT MILITARI.*" *Rudd. Hist. Winton. apud Angl. Sac.* tom. 1. p. 258.

"*Anno gratiæ, M.L.XXXVI. en la samiene de Pentecoste fist il son Fiz Henri CHIVALIER a Westmuser.*" *Chron. MS. in Bibl. Coll. S. Trin. Cantab.* (*Vide* 1 *Mad. Excheq.* 7. n. (i).)

To bear arms, "*ad arma suscipienda*," was the usual phrase for knighthood. (*Vide Stat. Milit.* 1 *Edw.* II.; see also 2 *Inst.* 597, and *post.*)

In the more rude ages of society, persons were from their earliest years inured to exercise and danger; they were robust and vigorous from their mode of life; they soon then became capable of bearing arms, especially as the arms of those ages were in general light. A pole pointed with iron, and an ozier shield, were the usual armour of the Germans; many, indeed, fought only with darts or clubs. Pectorals and helmets, and perhaps even complete suits of mail (*Loricæ*, says *Tacitus*, s. 6. and see 1 *Nor. Antiq.* c. 9. p. 242.), were known to them, but very seldom worn; (and *vide St. Remy, Mem.*

Mem. tom. 1. liv. 2. p. 100, 101.). At an early age therefore might the German, used from his infancy to martial amusements and employs, have been able to become a soldier.

Fifteen seems the age at which the youth in most nations in the northern parts of Europe (and, indeed, in states far removed from the supposed scenes of feudalism; see the *Code of Centoo Laws*, c. 2. s. 16.; c. 3. s. 8.) was considered at a subsequent period as being capable of bearing arms. (See 1 *Mall. N. A.* c. 9. p. 197. 1 *Montesq. Spir. Laws*, b. 18. c. 26.; b. 28. c. 25.)

In aftertimes however, when the arms became more ponderous and unwieldy, and when suits of "complete steel" were generally worn, the age of bearing them, or that of knighthood, was postponed, and consequently the minority protracted till twenty-one. (*Vide Montesq. ubi sup. Stuart's View*, b. 1. c. 2. s. 5. n. (2), p. 296. *Sulliv. lect. xii.* p. 123.)

"*Ante etatem verò VIGINTI UNIUS ANNORUM* (said a writer in the time of Edward the First), *ROBUSTOS VEL HABILES AD ARMA SUSCIPIENDA PRO PATRIA DEFENSIONE NON REPUTANTUR* —." (*Fleta*, lib. 1. cap. 9. s. 4. and *vide Britt.* c. 66. *Bract.* lib. 2. c. 37. s. 86. *b. Year-book*, H. 35 Hen. VI. s. 41. a.; 42. a. *Litt.* s. 103. *Co. Litt.* 78. *b. Stat. de Militibus*, 1 Ed. II. s. 5. and 2 *Inst.* 597.)

In still more distant days, indeed, the age of majority seems to have been fourteen, (and see here *Lacombe, Abrégé Chron. de l'Hist. du Nord*, tom. 1. p. 386, 7.) and, on the heavy armour becoming general, to have been extended to twenty years.

The northern nations allowed a certain latitude in calculations like these in favour of the persons affected,

fected. When a year was required, it added a day to that year, that it might be certain that it had actually elapsed; hence our "year and a day." In like manner another year was added to the fourteenth, and afterwards to the twentieth, that the heir might have time to sue out his livery, and to enter upon his lands; to inquire into the state of his property, &c. Hence the year of election still recognized by the Scottish law; hence too the *primer seisin*; the annual value of the land, as the relief of the tenant in soccage, &c.

"*Præterea si quis infeudatus major QUATUORDECIM ANNIS sua incuria vel negligentia PER ANNUM ET DIEM steterit,*" says the feudal law, "*quod feudi investuram a proprio domino non petierit, transactio hoc spatio feudum amittat.*" Dig. Feud. l. 2. t. 55. §. 543. cited post. 41. which see.

When the age of majority became deferred, we find a similar custom prevailing. According to the *Grand Coustumier de Normandie*, the heir in chivalry was considered as within age till he had accomplished his *twentieth* year. "*Et pour ce quilz doivent estre tenues en garde tant que les VINGT ANS soient accompliz.*" But it immediately adds, "*On leur donne UN AN, pur l'usage de Normandie, en quy ilz peuvent faire en court clameur & rappeler les saisines de leurs ancesseurs par enqueste. A celui qui a accompli VINGT ET UN AN nest pas otroyee l'enqueste de la saisine a son ancesseur, se l'ancesseur ne mourut dedens L'AN ET LE JOUR que la clameur a este faite.*" (*Vide Grand Coustumier*, c. 33. *De Garde Dorpb.* and c. 44. *De Non Age*, and *St. Palaye, Mem. Chival.* c. 5. *St. Remy, Mem.* tom. 1. liv. 2. p. 82.)

But.

But although the period of twenty-one years became at length the presumed and general age of majority, yet the lord, if he pleased, might have knighted his tenant at an earlier age. If from the strength of his arm, or his advancement in military skill, he conceived him worthy of the honours of chivalry, he needed not have waited till he should have completed his twenty-first year. But by conferring those honours on his tenant, the lord immediately terminated his minority. He had thus declared him capable of such manly employs, and, of consequence, could detain him no longer in ward. (See 2 *Inft.* 11, 12. (*Magna Charta*, c. 3.) and 597. (*Stat. de Militibus*.) *Stuart's View*, b. 1. c. 2. f. 5. n. (2). p. 296, 7. *Sulliv. lect.* xii. p. 124. 3 *Lord Lyttlet. Hen.* II. b. 2. p. 173. *Seld. Tit. Hon.* p. 2. c. 3. f. 37. *Works*, v. 3. p. 808, 9. 1004. and *vide St. Palaye*, c. 1 and 4.)

In this kingdom too, though the age of knight-hood had been for many centuries fixed at twenty-one, the lord might have claimed his aid *pour faire l'aine fitz chevalier* as soon as such son had attained to fifteen. (*Stat. Westm.* 1. 3 *Ed.* I. c. 36. and *Co. Litt.* 78. b.)

This was a relic of the ancient usage; and the ancient usage continued as to those infants who were not concerned in the change of armour, in many respects, to later times. It prevails to this day in the county of Kent; for, by the custom of that county, fifteen is still, as to many purposes, the age of majority. (See *Robins. Gav.* b. 2. c. 3. p. 185—222, &c. and the authorities by him cited. *Litt.* f. 104 and 123. See also *Montesq.* S. L. b. 18. c. 26. n. (*); and *post.* 293. N. CXLVI.)

We are told expressly by *Glanville* that the age of majority of the tenant in soccage continued in his days (*temp. Hen. II.*) to be fifteen: "*Si vero hæres & filius sokemanni fuerit, etatem habere intelligitur tunc cum QUINDECIM compleverit annum.*" (*Lib. 7. cap. 9.*) *Bracton*, who wrote in the time of Henry the Third, adverts to that of fifteen, and of fourteen also; he seems to recur to the ancient age: (*Vide Bracton, lib. 2. c. 37. f. 86. b. and lib. 5. c. 21. f. 422. a.*) And it is observable, that the latter author asserts that the male heir in soccage was to be out of ward as soon as he became capable of attending to husbandry and of conducting his rustic employs: "*Item vires requirit etas sockagii & discretionem & sensum, & secund. q. hæres sockmanni, possit & sciat ea exercere, q. pertinent AD AGRICULTURAM.*" And that the female became emancipated when able to govern her domestic affairs: "*Femina verò plenæ esse poterit etatis in sockagio omni casu, cum POSSIT ET SCIAT DOMUI SUÆ DISPONERE, ET EA FACERE Q. PERTINENT AD DISPOSITIONEM ET ORDINATIONEM DOM. UT SCIAT Q. PERTINEANT AD CONE,*" (*Sir Edward Coke reads cover, or coffer, 2 Inst. 203.*) "*ET KEY; q. quidem esse non poterit ante QUART. DECIM ANN. VEL DECIM. QUINT. quia bujushodi etas requirit discretionem & sensum.*" (*Lib. 2. c. 37. f. 86. b.*) The author of *Fleta*, who composed his treatise in the reign of Edward the First, mentions no certain number of years for the soccage tenant to be out of ward; but contents himself with saying, that the heir who held by that species of tenure became of age when marriagable. (*Vide Fleta, lib. 1. c. 9. f. 5.*) And the age of marriage he fixes at *fourteen*. (*Lib. 1. c. 13. and vide Britt. c. 67. Year-book, H. 35 Hen.*

Hen. VI. f. 40. b. &c. pl. 2. and f. 52. a. &c. pl. 17. 1 Roll. Abr. 342. tit. Bar. and Feme, (C.) pl. 5. who cites Skene Regiam Majestatem, 43. b. Stat. Mert. c. 6. an. 20 Hen. III. Westm. 1. c. 22. an. 3 Ed. I. and 2 Inst. 203.)

The cause of the additional year continuing as to the military tenant was, most probably, from the necessity of the suing of livery by the heir; and the right of the lord to retain the profits of the fief till such livery was regularly sued; in which case it was both for the benefit of the heir, and the interest of the lord of the fee. But as to the tenant in soccage, the wardship appertaining to the relations of the heir who were accountable for the profits of the tenancy, the reason for its continuance, in a great measure, ceased. By the custom of Kent, the heir was obliged to appear in the court of the lord and regularly demand his inheritance, which the lord was accordingly obliged to deliver (see *Rob. Gav. b. 2. c. 3.*); and fifteen, therefore, remained in Kent the age of majority. The age of marriage and discretion also having been fixed at fourteen, both by the common and civil law, prior to the times we are now speaking of, contributed towards the establishment of the age of fourteen as that of majority among such tenants who were not interested immediately in the change of armour.

As to the tenant in burgage, we find from *Glanville (lib. 7. cap. 9. and Bracton, lib. 2. cap. 37. f. 86. b.)* that he was to be out of ward as soon as he became capable of following his father's profession. The latter author says expressly, that there was, in his time, no certain age required: "*Si autem filius burgenfis, tunc etatem habere intelligitur, cum denarios discretè sciverit numerare, & pannos ulnare, & alia negotia similia pater-
terna*"

terna exercere: SED SIC NON DEFINITUR CERTUM TEMPUS, SED PER SENSUM ET MATURITATEM SUAM." The criterion of ability became at length so vague, nay absurd, that the courts (at least so early as the time of Edward the Second) insisted on the personal presence of the infant, that they might be satisfied that he had discretion to guide him. This, however, was not always practicable; and a certain and definite age was afterwards required as the period of emancipation; though, when *Glanville* wrote, we find that when doubts arose with respect to the majority of the ward, they were to be decided by a jury: "*Per legales homines de visineto. Et per eorum sacramentum,*" (l. 7. c. 9.) and *vide Fitzh. Abr. Garde. 127. Et Dum fuit infra etatem 3 Et 5.* See also *Robins. Gav. b. 2. c. 3. p. 223, &c.* and the authors by him cited, and *post. 325.*)

We shall have occasion, in the course of the following annotations, to apply these remarks in illustration of some of our present usages and laws. (See *post. 293. N. CXLVI. and 325.*) For to the history and manners of the times must we recur to illustrate those laws which were ordained in ages that are past, and those customs to which we have succeeded, as it were, by inheritance; to trace out their origin and mutation, the principles whereon they were founded, and their relation to the general system of our legal polity. From incidents such as these we have noticed, which are too frequently condemned as frivolous and idle by the indolent or captious, how often do discoveries of the first import proceed! But, as it has been well observed (*Ess. on Brit. Antiq. 160, 1. Ess. iv.*) "Lawyers are seldom historians, and historians as seldom lawyers."

NOTE

NOTE II. p. 1. (a).

"THE word *feudum* was not known here until about the year 1000. *Somner's Gavelkind*, p. 102." Note (*) to the third edition. See *Wright's Tenures*, 19.

Somner says, "It may very justly be doubted whether either the laws, stories, or other, either written or printed, monuments of credit of any nation or country can shew the word *feodum*, or *feudum*, in use among them, until after the beginning of the tenth century," p. 102. *Dr. Robertson* and *Mr. Butler* say not before the eleventh. See 1 *Charles V.* f. 1. p. 269, 70. n. (H); and *Mr. Butl. n. to Co. Litt.* 64. a. f. iii.

Dr. Stuart, indeed, informs us that there is certain evidence of its use on the Continent so early as the year 884; about which time it was often used as synonymous with *beneficium*. See his *View of Society in Europe*, b. 2. c. 2. n. 3. p. 352:

It should here be remembered, that, when those grants were at will, they were denominated *munera*; when they became for life, *beneficia*; and when they were permitted to be hereditary, or at least were extended beyond the life of the vassal, then, and not till then, they are said to have been properly styled *feuda*. See *Dalrymple on Feudal Prop.* ch. 5. f. 1. p. 190. *Sulliv. Lect.* 1. iii. p. 23. *Wright's Ten.* 19.

Yet, after all, it should seem that the term *feuda* was equally applicable to such gifts when only for life, or even at will: the term importing merely a conditional stipend or reward, or, as we still use it, a present, gratuity, a gift; for feuds, they tell us, were originally voluntary. See 2 *Blackst. Comm.* ch. 4. p. 45. *Stuart's View*, b. 2. c. 2. p. 94. and 353.

A. 3.

n. 3. 1 *Rob. Cba.* V. f. 1. p. 270. n. (H.) *Bull n. to Co. Litt.* 64. a. f. ii. *Somn. Gavelk.* 108.

The sense was well expressed by the terms *munus* and *beneficium*; and Sir *Edward Coke* says, that in feoffments, *do* or *dedi* is still the aptest word. See *Co. Litt.* 9. a. 2 *Bl. Comm.* ch. 20. p. 310. *Wright*, 16. and n. (k). 150.

From the manner in which many writers have expressed themselves on this subject, one would be induced to conclude that they conceived the term *feudum* to have been absolutely unknown till the grant was protracted beyond the life of the vassal; but such conception seems fraught with absurdity, and those expressions calculated only to mislead.

It is observable, that the word is acknowledgedly of a German or Gothic origin; whereas the terms *munera* and *beneficia* were as evidently from the Latin language. The former, therefore, must necessarily seem the more ancient, as thus applied, and that by which such gifts were originally styled. What seems to have led to the supposition, that the word was not known till the tenth or eleventh century, was its not being found in any authentic charter written before that period. But the conclusion does not, I think, appear warranted. It might not have been inserted in charters, &c. till that time; but it does not follow from thence that it was wholly unknown. The charters and laws of those days were chiefly, at least, in the Latin tongue; and this accounts for the use of the terms *munus*, *beneficium*, &c. in preference to that of *feudum*, which was forged out of the Gothic *feodb*, so barbarous in the estimation of the Latinist. If the apportioning of lands to the individual in consideration of returns and services, as known, at least in
later

later days, by the appellation of *feudal*, owed its birth to the northern nations, is it not reasonable to expect from the northern nations the term by which it was called? Can it be seriously supposed for a moment, that after denominating such portion of land by a term of foreign origin, that of *munus* or *beneficium*, for so many centuries, recourse should then be had to their native tongue; to a barbarous dialect, which, in many countries, was almost forgotten? Besides, what name could it have been known by before the Gothic nations became so well acquainted with the Latin language? The inheritance of the feud cannot possibly, in itself, make any alteration in the question: The term *feod* had no necessary relation to such hereditary quality; it was expressive only of a gift, a stipend, a reward, or, as we yet say, a fee; even *beneficium* was applied to an hereditary grant (see *Stuart's View*, b. 2. c. 2. p. 94. and 352. n. 3.), and *feudum*, in after-ages, to a grant for life. (See *Somn. Gavelk.* 108. and *Sir Thomas Smith's Commonwealth*, b. 3. c. 10.)

Perhaps the use of the word *feudum*, to express an hereditary grant, in preference to that of *munus* or *beneficium*, may be thus accounted for; *munus*, *beneficium*, and *feudum* seem, I say, originally of the same import; they were gifts. This signification of the two Latin terms was remembered, and appeared illy to comport with the idea of an hereditary estate. The term *feudum* was not so well understood; the same absurdity of application did not occur to the Latin scribe; he conceived it did not involve it; and he called the estate by the name, style, and title of a *feud*.

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As we have spoken so much on this head, it may not be improper to remark that *Whitacre* derives the term from the Celtic tongue, and discovers this celebrated system among the usages of our British progenitors. See 1 *Hist. Manch.* ch. 8. f. 3. And, indeed, our author himself seems rather of the same way of thinking; as, in his little *Treat on the Constitution of England*, he appears to consider the ancient Irish customs as similar, in a great degree, to those of our Saxon ancestors, or rather indeed as originally the same. See it at the end of his "*Cases in Law and Equity*," and in his "*Common Pleas*;" and also his *History of the Feud* (MS.) cap. 1. and see *Taylor on Gavelk.* 145. and 153.

NOTE III. p. 1. (c).

"By the feudal law, with respect to the relation between the sovereign and the subject, the right to the soil and the right to the profits of the soil were separate; the tenant being invested with the latter, the sovereign continuing to be intitled to the former. This right to the profits was of the most extensive nature; it gave the tenant, except for the purpose of alienation, the complete power or dominion over the land, during the term of his tenure." See *Batl. n. Co. Litt.* 64. (a). f. ii.

Thus the *dominium directum*, or absolute property, was, under this system, placed in the lord; while the *dominium utile*, or the right of possession, was in the tenant. See the *Introd.* v. &c. *Dalrymple, F. P.* c. 6. f. 1. *Wright's Ten.* 10. 58. 68. 147—9. *Stuart's View.* b. 1. c. 1. f. 1. c. 2. f. 1 and 2. and notes.

notes, *Stuart's Diff. on Antiq. Const. of Engl.* part 1. f. 3. and part 2. *Sulliv.* lect. iii and iv. *Kaims's Ess. on Brit. Antiq.* eff. 1. *Kaims's Tracts*, tr. iii. p. 125 and 2 *Bl. Comm.* c. 4 and 7. *Watk. on Desc.* ch. 3. f. 1.

NOTE IV. p. 2. (f).

IN ancient Germany the lands were divided annually among the individuals entitled, when they returned again to the state. See the *Introduet.* p. v.

And it is observable, that a similar distribution prevailed in the kingdom of Peru. See *Robert's Amer.* b. 7. v. ii. p. 312. 4to. edit.

This annual allotment seems to have been dictated by the annual produce of the earth. It was just that he who cultivated the land should enjoy the produce of his labours; and these it required the greatest part of the year to return; at least the remaining part of that year was not worth acceptance; and an annual distribution answered the purposes of agriculture in its then state.

It does not seem probable that the Germans, who had been used to yearly possessions, would be satisfied with estates at will. (See *Sulliv.* lect. v. p. 50.) Besides, when they migrated into the more southern provinces of Europe, those soldiers, who were free in their persons, appear by no means to have been so dependent upon their leaders or generals: it was *their* sword that conquered; and they thought themselves entitled to their share of the spoil. (See the *Introd.* p. vi. &c. *Stuart's Diff.* p. 3. f. 2. p. 137. n. (6). *Squire on the Anglo Sax. Gov.* f. 69, &c. 1 *Rob. Cha.* V. f. 1. p. 14. 256. notes. 2 *Rapin's Hist. Eng.* 141. n. (*). 8vo. edit. *Diff. on the Gov. of the Anglo Sax.*

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NOTES AND ILLUSTRATIONS.

However, authors coincide in asserting that *feuds* were anciently at will; and they were, in that stage of their progress, denominated *munera*. (See *ante*, p. 1. n. (a). But those gifts at will were, I conceive, only made to those for whom the lord was not obliged to provide, as he was for the soldier who conquered for him. Be this as it may, we find, most clearly, that feuds at a very early period became for life. The faithful follower who had shared the dangers of his lord became, when the conquest was effected, entitled to a provision for his latter days. If we consider the services he had already performed, and was still, by the policy of the times, to render, or the engagements he had entered into to be faithful and true; if we remember that he also had left his native lands in search of a permanent dwelling, we shall not conceive that he could have been required with a less estate. In this state of the feud they were termed *beneficia*. See note II. and further *Sulliv.* lect. vi. *Wright's Ten.* 14. 151. *Stuart's View.* b. 2. c. 1. f. 2. *Dalrymple*, F. P. ch. 5. f. 1. *Butl. n. Co. Litt.* 64. a. f. v. 4. 1 *Rob. Cba.* V. f. 1. p. 260, &c. n. (H). *Wask. on Desc.* ch. 3. f. 1.

NOTE V. p. 2. (g).

Allodial property was that which a person possessed in his own right, and of which he had the absolute ownership; in which the *dominium directum* was not divided from the *dominium utile*; it was opposed to *feudal*, which was held of a superior. The term is derived from the northern languages; from *Al*, *totus*, *integer*, *et absolutus*; and *Od*, *status*, *possessio*, *vel proprietas*. See *Stuart's View*, b. 1. c. 2. f. 1, 2, 3, and notes. *Diff.* p. 2. f. 3. 2 *Bl. Comm.* ch. 4. p. 45. *Sulliv.*

Sulliv. lect. v. vi. xi. xv. xxvii. *Millar's View of Engl. Gov.* b. 1. c. 5. p. 87. ch. 9. p. 183. *Wright's Ten.* 137. 146, 9. *Kaims's Eff. on Brit. Antiq.* eff. 1. *Co. Litt.* 1. b. *Harg.* n. (1) to *Co. Litt.* 65. a. *Butler's* continuation of n. (1) to 64. a. *Spirit of Laws*, b. 31. c. 8. *Somn. Gavelk.* 88. 104, &c. 1 *Rob. Cba.* V. f. 1. p. 256, &c. 266, &c. n. (H).

NOTE VI. p. 2. (i).

IT has long been a maxim in our law, that all the lands in England, in the hands of a subject, are held, mediately are immediately, of the king. This was a consequence of the feudal scheme. (See the *Introduct.* p. ix.) Yet it is said that *allodial* property continued among us till the time of Henry the Second; and is even yet to be met with in some of the isles of Scotland. See *Mad. Baronia Anglica*, b. 1. c. 2. p. 30. *Stuart's View*, b. 2. c. 2. p. 106. *Diff.* p. 3. f. 4. p. 178. n. (3). *View*, b. 1. c. 2. f. 1. n. (4). p. 208, 9. *Kaims's Eff. Brit. Antiq.* eff. 1. p. 19. *Harg.* n. (1) to *Co. Litt.* 65. (a). And see, as to its continuance on the Continent, 1 *Rob. Cba.* V. f. 1. p. 267, &c. 271. n. (H).

NOTE VII. p. 2. (k).

So in his "*History of the Feud*," before cited, our author seems to consider gavelkind lands as originally *allodial*; but whether the observation be just, that *allodial* land gave birth to gavelkind, appears to admit of much doubt. It seems inconsistent with the history of the times. Lands held in soccage, though evidently feudal, continued to descend to *all*

the sons so lately as the time of Henry the Second. See 2 *Bl. Comm.* ch. 14. p. 215. *Robinsf. Gav.* b. 1. c. 2. *Post.* 11. n. (x).

They were the military and honorary feuds which first became indivisible, and went to the eldest son alone (and military feuds, even in Kent, were inheritable by the eldest only. 2 *Inst.* 595. and *Robinsf. Gav.* b. 1. c. 5. p. 46.); and in imitation of these it was that the right of primogeniture took place in socage tenures. See *Blackst. and Robinsf.* as above. *Hale's Hist. Com. Law.* c. 11. p. 255. 257. *Wright*, 25, 6. 31, 2. 174. &c. 212. *Sulliv.* lect. xiv. *Butl.* n. to *Co. Litt.* 64. (a). f. v. (4). and *Post.* 12.

The custom of gavelkind, or the division of lands among the sons, prevailed also in Wales. It was the ancient usage of the country, and continued till the time of *Hen.* 8. It took place even in the cases of dignities and titles, and was productive of the most afflicting mischiefs among that people. See 1 *Whit. Manch.* c. 8. f. 3. 1 *Warr. Wales*, 4. 40. 217. 381. 438. *Hale's Comm. Law*, n. (B). 190. 250. *Robinsf. Gav.* b. 1. c. 2. *Taylor on Gav.* *passim*.

Among the Irish the lands were apportioned out among all the males of a clan; and a new division was made on the death of each tenant. See *Davys's Rep.* 28. b. Case of Tanistry, and 49. a. Case of Gavelkind.

NOTE VIII. p. 3. (m).

See *Litt.* f. 1. "This," as *Blackstone* remarks, "is plainly a relict of the feudal strictness; by which it

it was required, that the forms of donation should be punctually pursued; or, that, as *Craig* expresses it, in the words of *Baldus*, "*Donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit.*" And therefore (as *Blackstone* expresses it nearly in the words of *Wright*, see his *Ten.* 151, 2.) as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. "But this rule," he adds, "is now softened by many exceptions." 2 *Comm.* c. 7. p. 107, 8.

Of those exceptions, see *Co. Litt.* 9. b. 10. a. and *Mr. Harg.* notes. *Viner's Abr.* Estates, (K. 2) and (L). *Comyns's Dig.* Estates (A. 2). *Touchst.* 101. *Post.* 72. 74, 76.

NOTE IX. p. 10. (u).

THIS was what, in after times, was denominated *frank marriage*; and which, though now in a great measure obsolete, is still recognized by law. Our author says, that on such gifts the estate was limited to the issue of the marriage by the feudal donation: In later times, however, the very word *frank-marriage* was deemed, by our law, to be sufficient in itself to create an estate in special tail in the donees. See of *frank-marriage*, *Litt.* f. 17. and *Co.* on that section. 2 *Bl. Comm.* ch. 7. p. 115.

NOTE X. p. 11. (w).

IN early times women were not permitted to succeed to a proper feud, as they were incapable of performing

forming the services required. Indeed, among rude nations, women were seldom suffered to partake of the property of the tribe or family, with respect, at least, to the use or ownership of land; for they did not need it: Before marriage they remained part of their father's family, and, afterwards, the husband provided for them. The provision so anxiously made for them by the Gentoo laws is pleasing: "So long as a woman remains unmarried, her father shall take care of her; and so long as a wife remains young, her husband shall take care of her; and in her old age her son shall take care of her; and, if before a woman's marriage her father should die, the brother or brother's son, or such other near relations of the father, shall take care of her; if after marriage her husband should die, and the wife has not brought forth a son, the brothers and brothers' sons, and such other near relations of her husband, shall take care of her: If there are no brothers, brothers' sons, or such other near relations of her husband, the brothers, or sons of the brothers of her father, shall take care of her; if there are none of these, the magistrate shall take care of her. And in every stage of life, if the persons who have been allotted to take care of a woman do not take care of her, each in his respective stage accordingly, the magistrate shall fine him." *Code of Gentoo Laws*, c. 20.

In barbarous ages their rights were less respected; and they required a stronger arm for their protection and support. When they were, at length, permitted to succeed to an inheritance, they were postponed to males; and they succeeded first to those lands for which no returns were due, or which, when due, were not incompatible with their nature or manners to perform. They inherited allodial property; and then

then those improper feuds for which no services were demanded. They afterwards succeeded to soccage tenures; and when the military services were admitted to be performed by deputy, or commuted for money, they were permitted also to succeed to military feuds.

To honorary fiefs they were admitted in early times. Their dignities they were often empowered to communicate to their husbands; but when they remained unmarried, they performed the functions of their office in person; they sat in courts to debate and to decide; they assisted their sovereign with their counsel; and they passed judgment on their peers.

With us, at this day, women succeed to the inheritance in all cases where not expressly precluded by the gift or by the custom of a particular place; but they are postponed to males; and the right of primogeniture is not permitted among them. They succeed equally, except to dignities and titles of honour; and, in these latter cases, the king selects the individual to succeed. With respect to dignities and titles, however, their rights and privileges are not so extensive as they formerly were; they cannot now communicate them to their husbands; they cannot now take a seat in parliament; nor can they sit in judgment on a peer,

See *West. on Peers passim*; *Collins's Claims to Baronies passim*; *Stuart's View*, b. 1 c. 1. f. 2. c. 2. f. 2. and notes, and p. 205, 6. *Wright's Ten.* 26. 28. 31. 33. 177. and notes. *Dalrymple, F. P.* ch. 5. f. 3. *Kaims's Brit. Antiq.* eff. 3 and 4. 2 *Bl. Comm.* ch. 14. *Hale's Comm. Law*, ch. 11. *Butl.* note (1) to *Co. Litt.* 64. a. n. (2) to p. 325. (b). *Sulliv.* lect. xiv. *Stu. Disc. prefixed to Sulliv.* 5. n. (7), &c.

3 *Lord Lyttleton's Hen.* II. p. 339. 1 *Tyrr. Hist. Engl.* b. 4. p. 210. See also *Barrington's Obs. on the Statutes*, 48. 51 *Hen.* 3. f. 6. and *post.* next notes (*), and XI. and p. 12, 13. 107. 324. and N. CLXVIII.

NOTE XI. p. 11. (y).

SEE, of the right of primogeniture, 2 *Bl. Comm.* ch. 14. p. 214. *Dalrymple, F. P.* ch. 5. f. 1. *Robins. Gav.* b. 1. c. 2. *Kaims's Brit. Antiq.* eff. 4. *Hale's Common Law.* ch. 11. *Wright's Ten.* 25, 6. 31, 2. 174. 177. 212. and notes. *Stuart's View*, b. 1. c. 2. f. 3. p. 32. and 220. n. (3). *Sulliv. lect. xiv. Butl. n. on Co. Litt.* 64. a. f. v. (4). *ante*, 2. (d); and note VII.

It should be here observed, that, according to the feudal law at one stage of its progress, after fiefs became indivisible, the lord had the power of selecting the son to succeed; and we accordingly find instances of the exertion of this privilege even in our own kingdom, and that so lately as the time of Henry the Second. "*Galfridus de Mandeville senex tenuit Baroniam de Mersewude,—et genuit de prima uxore sibi desponsatâ, Robertum de Mandevillâ.—Galfridus autem senex de Mandevillâ—aliâ uxorem desponsavit de quâ genuit Radulphum de Mandevillâ. Qui post obitum ipsius Galfridi senis tenuit prædictam Baroniam PER VOLUNTATEM HENRICI REGIS EO QUOD FUIT MELIOR MILES, QUAM ROBERTUS DE MANDEVILLA FRATER EJUS.*" *Mag. Rot.* 10 *Joan Re. Rot.* 11. b. 1. *Mad. Excheq.* c. 13. p. 489. n. (q). *West. on Peers*, 5. See *Kaims's Eff.* eff. 4. p. 149. *Dalrymple, F. P.* ch. 5. f. 1. p. 193. *Stuart's View.* b. 2.

c. 2. p. 93. and 351. n. (2). *Sulliv. lect. xiv. p. 136.*
See also 1 *Lamb. Obs. As. Af. and Am. c. 11.*

“ A beautiful instance of the remains of this ancient practice,” says Dalrymple, “ is still to be seen in the law of England at this day upon the devolution of a peerage to heirs female. Upon that emergency it is the king’s privilege to confer the peerage upon any of the daughters he pleases.” *F. P.* 193. See the last note.

At this day, indeed, when dignities are detached from real property, the privilege we are speaking of cannot interfere with, or direct the disposition of the possessions of the noble person so dying without issue-male. But, while the peerage continued feudal and annexed to territory (and such it was from the Conquest till the latter end of the reign of Henry the Third; though the castle of Arundel in Suffex is said to be the only instance of the kind now remaining among us, unless, indeed, we consider the baronies of our bishops in this light; of which see 1 *Blackst. Comm. c. 2. p. 155, 6. Warburton’s Alliance, b. 2. c. 3. p. 146, &c.*), that territory, and those possessions to which it was so annexed, must, of necessity, have been enjoyed by the individual so selected by the king. Indeed the extent of that privilege, during the reigns of the first eight monarchs from the conquest, is strongly shown by the following passage: “ *Notæ; q. en nuper obiit port par ii soers vers le tierce soer, fuit all. en barr. un custome qu. fuit tye: Quod si aliquis baro. dni. Regis tenens de Rege obiisset, en no. haberet bered. nisi filias, et primogenite filie maritate sunt in vita patris, Dns. Rex daret post natam filiam que remaneret in bered. patris alicui milit. suorum CUM TOTA HEREDITATE PATRIS SUI DE*

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QUA OBIISSET SEISITUS, *ita quod alie filie nihil recuperent versus post natam filiam in vita sua*: ET OMNES REGES HABUER. HANC DIGNITATE. A CONQUESTA." 3 Hen. III. Fitzb. Abr. 1. Prescription, pl. 56. See also Kaims's *Ess. on Brit. Antiq.* eff. iii. and Dalrymple, F. P. ch. 8. And of Arundel castle, particularly see 1 Bulst. 196. 1 Lord Raym. 72. 1 Salk. 253. Heylin's *Help to Engl. Hist.* tit. Arundel. *Camd. Brit.* tit. Arundel. *Seld. Tit. Hon.* part 2. c. 9. f. 5. *Works*, p. 897. 1695. V. 3. *Mad. Baronia Angl.* b. 1. c. 1. p. 23. Notes (1) to *Co. Litt.* 16. b. and (6) to 31. b.

The stat. 12 Car. 2. c. 24. f. 11. has a saving with respect to *feodal* titles of honour.

See n. (3) to *Co. Litt.* 15. b. where the barony of *Berclay* is considered as *feudal*.

So inseparable was the dignity from the territory in these cases, that whenever there was a transfer of the latter the former also was transferred. As those territories, indeed, which were held *per baroniam*, were, of consequence, held immediately of the king, his consent was indispensable to the alienation. (See *Madox's Baronia Angl.* b. 1. c. 1. p. 23. and *Collins on Baronies* 113. *Sulliv.* lect. xx. p. 188.) An instance of such a transfer is given us by Lord Kaims, (*Brit. Antiq.* eff. iii. p. 79, &c.) which occurred in Scotland in the fourteenth century. Thomas Fleming, Earl of Wigtoun, granted that earldom, by his charter, to Archibald of Douglas knight of Gallway:—After the alienation (which was confirmed by king Robert) the grantor was no more considered as an earl; nor did he assume the title; but the grantor took upon himself the stile of the earl of Wigtoun. The circumstance of the honour following the lands, is ludicrously

ludicrously adverted to in an old ballad given us by *Percy* (*Reliques of Anc. Eng. Poetry*, vol. 2. p. 128.), intitled *The Heir of Linne*. At this day, however, it should seem, that a peerage cannot be transferred (unless we consider the summoning of the eldest son of a peer by writ as a transfer of one of his father's baronies. See *West on Peers*, 49, &c.) without the concurrence of parliament; at least in those cases where the noble personage has no other barony to remain in himself; as otherwise, on the transfer, he would himself be deprived of his peerage, and be made ignoble by his own act. The earldom of Arundel is now settled by act of parliament in the Norfolk family; and even if it were not, it might be questioned whether, under the supposition of no remaining barony, such an one could now be otherwise conveyed; as it has been long settled that the whole nation is interested in each individual peer; and that a peer cannot be deprived of his peerage but by act of parliament. See *Shaw. P. C.* 1. &c. *Vise. Purbec's case.* 12 Co. 108. 1 Bl. Comm. c. 12. p. 402. *Mad. Baron. Angl.* b. 1. c. 1. p. 25.

NOTE XII. p. 12. (a).

By the feudal policy a new tenant could not have been introduced into a fief but by the consent of the lord. Hence the vassal could not alien without his permission; it therefore was reasonable, in the case of females, to ordain that the lord's approbation should be obtained before the tenant should enter into marriage. By marriage the husband became settled in the feud (see *post.* 108. (k). 289. and N. CXXXVI. 224, and N. XCVII.); and, without this precaution,
the

the tenancy might have been transferred at the will of the feudatory. Besides, the marriage might have been contracted with a person of another barony or tribe, which perhaps was at enmity with the lord: this was an additional reason to make the lord's consent necessary; and this is noticed by *Sir Edw. Coke*, (1 *Inst.* 78. b.) "And the reason," says that writer, "as I find in antiquity, wherefore the law gave the marriage of the heir female,—and that she should not marry herself, was, *pur ceo que les beires females de nostre terre ne se marieront a nous enemies, et dount il nous coviendroit lour homage prendre, si eux se puissent marier a lour voluntés*, Britton, c. 67. and *vide Glanv. lib. 7. c. 12. 55. b. Charter of Henry I. apud Blackst. Introd. to the Great Charter, viii. n. (c). Brañ. lib. 2. c. 37. f. 6. f. 88. a.* And from the closeness of the connection and relations of marriage, these reasons held equally as to males.

These reasons were of continued cogency during the life of the vassal; and during the life of the vassal was the consent of the lord once requisite to his marriage. In after times it was confined to the first marriage: in some countries, and during some periods, to the first marriage of females only. It underwent many regulations and restrictions, and ended in the most distressing oppressions. In this kingdom it was happily abolished, with many other relics of feudal tyranny, by the statute 12 *Car. 2. c. 24.*

See the *Introd.* p. xviii, 2 *Bl. Comm.* ch. 5. p. 70. ch. 6. p. 88. *Dalrymple, F. P.* ch. 2. f. 2. *Sullivan.* lect. xiii. p. 129. *Wright's Ten.* 82, 86, &c. *Stuart's Diff.* p. 2. f. 2. p. 101. *Post.* 108. (k):

NOTE XIII. p. 12. (b).

THE right of representation was not so soon established as that of primogeniture : when it was an acknowledged axiom that the eldest son should succeed, it was strenuously disputed whether the second brother should not take place of his nephew. This was from the manners of the times : the nephew was often an infant ; the uncle was already capable of bearing arms ; and this circumstance had its weight in ages of turbulency and spoil.

See the authors referred to p. 11. n. (y) ; and 1 *Blackst. Comm.* 201. ch. 3. and 1 *Rob. Cba. V.* f. 1. p. 352. N. (Y) ; and *post.* N. XIV.

NOTE XIV. p. 13. (g).

IN the author's manuscript *History of the Feud*, the doctrine of the text, from page 10 to 20 inclusively occurs almost in the same words. The following passage, however, is found in the MS. which is omitted in the text : " By the feudal law they thus carried down the inheritance to all the descendants ; but they allowed of no adoption according to the institution of the Roman law, because they, in all feudal donations, respected the blood of the feudiary ; and therefore they had not the liberty to adopt, which might carry the feud out of the blood of the feudiary whom the lord had chosen for his fitness in the wars ; and, by consequence, a stranger to that blood was not to be admitted : besides that the law of adoption had been found very prejudicial in the Roman government, where the empire had seldom continued for three descents in the same line ; because the reverence

rence to the family decayed by the admission of strangers, not of the blood of the emperor; and therefore they thought, with reason, that these feudal dominions and estates could not be built up, or better settled, than by preserving a constant reverence to the blood of the first feudal possessor.

“ So that the blood of the possessor was in the first place considered, because the gift was for military virtue in the wars, which they apprehended would be derived to the descendants: so also, as it is said, they preferred the eldest, because they esteemed the best and most worthy blood to be continued in the eldest son, and that he would be first ripe and fit for the feudal services; but the privilege and prerogative of age was postponed to the privilege of sex: for if the daughter was elder than the son, yet the son was preferred, because the disability in the male, by reason of nonage, was but temporary; but that of sex was perpetual.

“ But yet the daughter of the elder son was preferred to a younger brother, because she was the representative of the elder line: but this was to prevent the bloodshed which would have happened in those barbarous times, if they had not thus constituted the line; for they usually married the eldest son in the life of the father, by the consent of the feudal lord, and therefore they ever preferred the issue; otherwise the second son had been next to the feud, in case the eldest son had died leaving issue, and there would immediately have arisen contentions among the sons; and they would have endeavoured to cut off the eldest son, in order that they might have succeeded in his place: but all hopes of this kind were excluded, by admitting his issue, of what sex soever,
into

into the inheritance; besides, they could not have married their eldest son to the same advantage, if their issue of what sex soever had not inherited.

“ So that to constitute the line among equals, the prerogative of age obtained, and obtained so far as to carry the succession to the representative; and the prerogative of the line was preferred to the privilege of the sex; the privilege of the sex was preferred to the prerogative of age; and by these means the whole feudal succession in the descendants of the first feudatory got its establishment.” *Fol.* 35, 36.

NOTE XV. p. 17. (r).

A *feudum novum* could devolve only to the *descendants* of the feudatory to whom it was granted. It became at length usual to grant such feud to be held *ut antiquum*: the properties of an ancient feud were conceived then to attach to it; and it became descendible to *collaterals*; to any who could derive his blood from the *supposed* original feudatory. Of this kind are all our grants, in *fee-simple*, at this day. See *ante*, 13. (b). *Wright's Ten.* 17. 25. 180. and notes. 2 *Bl. Comm.* ch. 14. p. 220. *Kaims's Brit. Antiq.* eff. 4.

NOTE XVI. p. 17. (u).

THE guardian in foccage was, (and still is,) by the laws of England, the nearest of kin *to whom the lands could not possibly descend*. To place a minor in the care of a person who might succeed him in the inheritance, is, says the law, *quasi agnum lupo committere ad devorandum*. See *Co. Litt.* 88. b. and *Mr. Harg.* n. (6). 1 *Bl. Comm.* ch. 17. p. 461. *Sulliv.* lect. xiii. p. 127.

But

But this maxim partakes strongly of the barbarity of the times; and, though the barbarity of the times might have warranted its institution, the adherence to it at this day has been warmly reprobated;—with what justice or propriety is left to others to decide. See 2 *Pr. Wms.* 264. and *Harg. n.* (6) to *Co. Litt.* 88. b.

NOTE XVII. p. 19. (e).

THIS position, that “the blood of the father’s mother was preferred to the blood of his grandmother,” has been the subject of much controversy. It was advanced by Justice *Manwoode*, in the case of *Clerc and Brooke* (see *Plowd.* 450.), and adopted by Lord Bacon and Sir Matthew Hale: it has been strongly and ably opposed by Mr. Justice Blackstone (see his *Comm.* ch. 14. p. 238. n. 2.), and as warmly defended by Mr. Osgoode. (See his *Desc.*)

The writer of this note feels doubly sensible of the importance of his undertaking, and doubly diffident of his ability acceptably to accomplish it, when he is about to enter the lists with such mighty names: but having thus commenced Annotator, it becomes him not to tremble in the day of doubt; and he will, therefore, firmly acknowledge, that he coincides in sentiment on the point now under consideration with the learned commentator on the laws of England;—though opposed by a Bacon and a Hale,—and even by our author himself.

It is an acknowledged maxim in our laws, that the paternal is always preferred to the maternal line; and that a feud held *ut antiquum* is supposed to have descended paternally. It is also established, that the brother of the grandmother shall succeed before that
of

of the mother (*Plowd.* 444. *Dyer* 314. a. *pl.* 95. *Clerc v. Brooke*). And why should we stop here? Why should not the blood of the father's grandmother be preferred to that of his mother?—Because, say they, the proximity shall prevail. But is this assertion founded on truth?—Does it not rather, as Mr. Justice Blackstone observes, directly contradict many instances given both by Plowden and Hale, and most, if not all, writers on the laws of descent?—Does it not militate against axioms which were never denied?

If, when the question is between those of the paternal and those of the maternal line, the law always gives the preference to the former, (See *Dougl.* 778.) Does not the preference, in the case now under remark, belong to the father's grandmother?—Are not the heirs of *a mother* preferred to those of *a wife*?—If the hereditaments cannot *be proved* to have descended from the mother, are not *they presumed* to have come from the father? This is the principle of the *feudum novum* held *ut antiquum*. If they cannot be proved to have come from the grandmother, will not the law deem them derived from the grandfather? Now, if this be the presumption here, that they descended from the grandfather,—must not the blood of the great grandmother be entitled in preference to that of the grandmother?—for this plain reason: because the lands, being supposed to have come from the grandfather, and his *paternal* line being exhausted, the law will, on such consideration, presume that they came to *him* from his *mother* rather than from his *wife*; otherwise where is the observance of the rule, that the preference is due to the *paternal* line?—If the question be between a couple of ancestors, however remote, is not the presumption in favour of the

male?—If the question be between the heirs of the mother and the heirs of the wife of such male, does it not belong to the former?—If the law then supposes the hereditaments to have been vested in the male ancestor, can the paternal blood be said to be exhausted, while any descendant of *his* mother remains?—And does the law ever call in the blood of a female ancestor till that of the male be extinct?—If the lands therefore came from the grandfather, are not *his* mother's heirs the first entitled, if those of his father be no longer to be found?—If you prefer the blood of the grandmother to that of the great-grandmother, do not you contradict the very axiom you set out with? Do you not give the preference to the grandmother rather than to the grandfather?—To the wife than to the husband?—To the female than to the male? Can you be said to prefer the grandfather when you shut out *his* maternal heirs from the succession?—If a person's blood be composed of that of *both* of his ancestors, can his blood be considered as exhausted when one half of it remains?—Can you deem it wholly extinct when one half is not taken into consideration?

If, then, we would preserve a consistency in our deductions, should we not be warranted in affirming the rule which we ought to pursue in these cases to be this: When we trace the *paternal* line, to begin with the father (as a common ancestor) of the person last seized, or first purchaser, and proceed *upwards*, through the grandfather, great-grandfather, &c. as far as the line can be pursued; and, when the heirs of this part can be no longer discovered, to begin *with those of the wife* OF THAT PATERNAL ANCESTOR WITH WHOM OUR DISCOVERIES ENDED; and continue in a

contrary direction, proceeding *downwards*, to the heirs of the mother?

* * The Editor had not seen *Mr. Christian's* edition of the *Commentaries* till after he had written the preceding part of this note. It is with much pleasure, however, that he is now enabled to refer the reader to what that annotator has advanced in support of this controverted position of the very learned judge: and, at the same time, he must acknowledge that he feels much pleasure also in finding his own observations so strongly corroborated by those which that annotator has presented us with. See note (17) to 2 *Comm.* 240.

NOTE XVIII. p. 20. (f).

A BASTARD is, by our law, incapable of inheriting, being esteemed *filius nullius*: neither can he have any heirs except his own descendants; for as he has no legal ancestor, there can be no common stock. If he dies without issue and intestate, his acquired hereditaments will escheat to the lord of the fee. See 1 *Bl. Comm.* ch. 16. p. 458.

Among the ancient Welsh and Irish, bastards inherited or were admitted to their portions with legitimate children; till the custom was abolished among the former by *Stat. Wallia*, 12 *Ed.* I. and among the latter till it was adjudged illegal and void by the justices in Hilary, 3 *Jac.* See *Davy's Rep.* 49. 2. *Case of Gavelkind.* *Tayl. on Gavelk.* ch. 2 and 15.

NOTE XIX. p. 20. (g).

THIS was never adopted by our law. The clergy endeavoured to obtain its adoption in the parliament

NOTES AND ILLUSTRATIONS.

of *Merton*, 20 *Hen. III.* (c. 9.); but the lay members rejected it with much warmth and firmness; declaring with one voice, *that they would not change the laws of England which had thitherto been used and approved.* See 2 *Inst.* 79—96. *Blackst. Introd. to the Great Charter*, p. lxxxiii, 8vo. edition, *sub anno* 1253. 1 *Bl. Comm.* Introd. s. 1. p. 19. ch. 16. p. 454. See also *Barrington on the Stat. of Merton*, c. 9.

So that, still, if a child be born before marriage, though its parents marry afterwards, it is nevertheless a bastard by the laws of England.

See further, *post.* 29—31.

NOTE XX. p. 21. (i).

As the heir has the right to the hereditaments descending, the law presumes that he has the possession also. This presumption may indeed, like all other presumptions, be rebutted: but if the possession be not shown to be in another, the law concludes it to be in the heir; as the freehold is never considered as vacant, or in abeyance: there must have been a tenant to discharge the feudal duties and returns, and to answer to the *præcipe* of a stranger. See *Wak. on Desc.* ch. 1. s. 1. p. 25. and ch. 4. p. 131.

NOTE XXI. p. 22. (j).

For it is essential to a descent which takes away an entry, that the ancestor should die seised (either in deed or in law, See *Co. Litt.* 239. b.) of an estate in *fee-simple* or *fee-tail*; the dying seised of a descendible freehold only, will not take away an entry. *Litt.* s. 387. and *Co.* upon that section.

But

But it should be here observed, that a disseisor gains a fee-simple by his disseisin, except when a remainder or reversion be in the King (who cannot be disseised); as an estate gained by wrong is always a *quasi fee*: so that if a tenant for life only be disseised, the disseisor has a fee-simple; and if he die seised, the descent will toll an entry. See *Heb.* 322, 3. *Bro. Eft.* 17. *Ca. Litt.* 42. b. 296. b. and n. (1).

NOTE XXII. p. 24. (c).

WHEN feuds were only for life, it was often usual to grant them again to the son of the deceased tenant: this, at length, became customary; and, from a coincidence of events and circumstances necessarily flowing from the then state of manners, ripened ultimately into hereditary succession. The son, on his acceding to the feud, acknowledged the bounty of his lord; that he received it as a gratuity and not as of right: and this gave birth to the relief. The lord gave him the seisin of the feud in the presence of his fellow-tenants. The relief continued after the feud was strictly inheritable; and, being originally arbitrary, became the source of oppression. The seisin was in England soon succeeded by the entry of the heir (except as to lands *in capite*): But in some countries (and to this day in the kingdom of Scotland) the seisin was regularly delivered to him, and he received it as the renewal of his ancestor's grant. See 2 *Bl. Comm.* ch. 5. p. 65, 66. ch. 14. p. 209. *Dalrymple, F. P.* ch. 6. § 3. p. 245, 252—3. *Kaims's Low Tracts*, Tr. V. XII. XIII. *Sulliv.* lect. xi. *Wright's Ten.* 97. and *ante Introd.* p. xvi.

And, it is worthy of remark, this usage of giving the possession or seisin to the heir on the death of the

ancestor, is still observed by us in the case of copyholds; with respect to which tenures the feudal customs are more rigidly attended to and enforced. See 2 *Bl. Comm.* ch. 22. p. 367. *Poff.* 155. N. LXVI. 230. N. C.

NOTE XXIII. p. 24. (p).

If the heir die before entry or actual possession, the relief is equally due: for, immediately on the descent, the lands become vested in the heir, who consequently becomes immediately tenant to the lord. The relief is payable on his accession to the feud; which he is entitled to, by our law, the instant of his ancestor's decease. See *Fitzb. Abr. Relief*, 12. *Brooke, Relief*, 2. *Kitch.* 146. a. *Co. Litt.* 239. b. n. (1).

NOTE XXIV. p. 25. (q).

“WHEN the lord comes to the lands by escheat, the law only casts the freehold upon him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and, as by his entry he fills the possession, the lord's title, which was only good while a tenant was wanting, must necessarily be at an end.” *Mr. Butl.* note (1) to *Co. Litt.* 240. a.

A distinction is noticed in the *Tear-book*, 32 *Hen. VI.* by *Littleton J.* as to the entry of the lord, in the case of the disseisee's death without issue, when the entry of the disseisee was tolled at his demise, and when not: in the first case, as the disseisee or his heir could not have entered on the disseisor or his heir, so neither could the lord, who, in such instance, would be obliged to take the disseisor for his tenant, till his title should be legally disproved. In the latter case,

case, as the disseisee or his heir might have entered, the lord also might enter on the failure of the heirs of the disseisee. See *Hil. 32 Hen. VI. pl. 16. fol. 27.* See also *Co. Litt. 83. b.* and *2 Roll. Abr. 518. Ten. (I). pl. 7. F. N. B. 144. C.*

And note also, that if the disseisee die, his heir (the entry not being tolled) shall pay a relief. See *2 Roll. Abr. 517. Ten. (G). pl. 2. and p. 518. (I). pl. 7.*

See *Post. 63 and 66.*

NOTE XXV. p. 26. (s).

SEE *Wask. on Desc. ch. 1. s. 3. p. 81.* And note, that it is there said that, "with respect to freebench of copyholds, it is otherwise;" and see *5 Burr. 2787.* But it was so said with respect to those cases only in which the widow takes the *whole* of the estate as her freebench; when she takes a *portion* only of the estate, it should seem that the possession is *not* cast upon her any more than at common law; the heir being then the tenant for the whole estate; and the widow should have her portion assigned. See *Kitch. 103. b. 2 Show. 184. ca. 186. Chapman v. Sharpe. Post. 173.*

NOTE XXVI. p. 31. (f).

THE infant can, in this case, neither make himself heir to his father nor yet to his brother the bastard *signé*. The bastard entered, and the law presumed him, as eldest brother, to be the rightful heir of his father; and, as he (the bastard) was suffered to enjoy the possession in peace till his death, it will not now permit his legitimacy to be questioned. Presuming,

therefore, that he was the rightful heir, the younger brother will not be suffered to allege that he was *not* such; and to claim himself, as heir to the father; since the eldest died in possession, and has left a son on whom the law casts the descent. The younger brother, therefore, cannot now claim by descent; as he cannot show himself heir to any one.—This seems the meaning of our author; and see the last page.

NOTE XXVII. p. 37. (*m*).

BUT now by the stat. 32 *Hen.* 8. ch. 33. the descent to the heir of a disseisor shall not toll the entry of him who has right, unless such disseisor had the peaceable possession for the space of five years next after such disseisor without entry or claim.

Nor can any one enter into lands but within twenty years after his right shall accrue, 21 *Jac.* c. 16.; nor shall even such entry be effectual, unless, upon such entry or claim, an action shall be commenced within one year next after such entry or claim, and prosecuted with effect, 4 & 5 *Ann.* c. 16. s. 16.

NOTE XXVIII. p. 38. (*p*).

WHEN the tenant omitted to discharge strictly the duties of the feud, the lord might have resumed it immediately. This resumption was, in many cases, soon considered as unnecessarily severe; and *distresses* were, in consequence, introduced, after the manner of the civil law, to compel the tenant to perform his services and returns in cases which did not seem to call for a punishment so heavy as forfeiture. But this privilege of distress was itself soon turned to oppression; and we accordingly find it restrained and regulated

lated by some of our earliest laws. See *Gilb. on Rents*, 3, &c. *Gilb. on Distresses and Replevins*, 1, &c. *Sulliv. lect. x.* p. 97, &c. *Wright*, 198.

NOTE XXIX. p. 39. (q).

SEE the *Introd.* p. xiv. and further on this subject, *Dalrymple, F. P.* 224, &c. ch. 6. s. 1. *Kaims's Hist. Law Tracts*, Tr. II. and III. 2 *Bl. Comm.* ch. 20. p. 307—317, and *Post.* 53. 69. 83. 118. 250. N. CXI.

The reason, and indeed necessity, for giving the *seisin coram paribus*, is so happily pointed out and expressed by *Sullivan*, that I trust the following extract from his *Lectures*, will carry with it an apology for its insertion:—"The presence of the *pares curia*," says he, "was required equally for the advantage of the lord, of the tenants, and of themselves; of the lord, that, if the tenant was a secret enemy, or otherwise unqualified, he might be apprized thereof by the peers of his court before he admitted him; and that they might be witnesses of the obligation the tenant had laid himself under of doing service, and of the conditions annexed to the gift, if any there were, which the law did not imply; for the benefit of the tenant, that they might testify the grant of the lord, and for what services it was given; and, lastly, for their own advantage, that they might know what the land was, that it was open for the lord to give, and not the property of any of the vassals; and also that no improper person should be admitted a par, or peer of their court, and consequently be a witness, or judge in their causes." *Lect.* vi. p. 58. See *West on Peers*, 63. and *Post.* 250. N. CXI.

NOTE

NOTE XXX. p. 45. (w).

THERE seem to be a confusion of expression and want of perspicuity in this passage. It has often, and justly been regretted, that the works of this most ingenious author should have suffered so much from the negligence or ignorance of transcribers. The passage now before us seems to present itself as a glaring proof of that lamented inaccuracy, which the inattention or haste of a copyist has occasioned.

It is said that "the possession of the heir cannot be abated before he is actually possessed." Now it is certain that it cannot be abated afterwards; for a dispossession afterwards, would be a disseisin and not an abatement. The abatement, therefore, properly is of the legal or ideal possession which the law presumes to be in the heir from the death of the ancestor *till* his own *actual* possession, and which is capable of being divested, at least in theory, or rebutted in presumption; though it, as clearly, will not admit of a trespass or actual violence.

Again it is expressed that "no man can be said actually to enter till the actual possession is in him." Now the actual possession seems rather the consequence of the actual entry, than the entry the consequence of possession.

The doctrine which our author appears to have intended to convey was this:—Though a person has a freehold in law, yet he shall not have an action of trespass before entry; as the heir shall not have such action against an abator. For a trespass is an injury done to the actual possession of a person, and not to the supposed or ideal possession which the law casts upon

upon the heir; for such a presumed possession cannot possibly be capable of an actual violence. 'Till the heir, therefore, gains the actual possession, by his actual entry, or by what the law deems tantamount to such entry, he cannot have suffered that real and actual injury which is implied in the legal acceptance of a trespass; and, consequently, shall not be permitted to institute an action for the reparation of an injury which he could not in the nature of things sustain.

NOTE XXXI. p. 47. (y).

THE trial by battle is generally supposed to have been introduced into this kingdom by the Normans. Yet, though the history and laws of the Saxon times are so remarkably silent on the subject, there does not, I think, appear a sufficient reason to preclude them from the use of it, as it was so common to the Gothic tribes. See 1 *Tyrr. Hist. Introd.* p. cxxv. 2 *Rapin's Hist. Eng.* p. 200. 8vo. edit. *Diff. Gov. Anglo-Sax.* ch. 8. 2 *Henry's Hist. Eng.* b. 2. ch. 3. f. 3. p. 304, and 3 *Ib.* b. 3. ch. 3. f. 1. p. 355. 4to. ed. 2 *Bl. Comm.* ch. 22. p. 337. *Millar's View of Eng. Gov.* b. 1. ch. 4. p. 74. *Falc. Clim.* b. 1. ch. 18. p. 90. *Stuart's View of Soc. in Eur.* b. 1. ch. 2. f. 4. p. 48, and 271. *Diff.* p. 4. f. 4. p. 265. *Montesq. Spir. Laws*, p. 28. ch. 14. *Bacon on Eng. Gov.* p. 1. ch. 37. *Dalrymple, F. P.* ch. 7. f. 2. *Sulliv. lect.* xxvi. p. 250. 1 *Rob. Charles V.* f. 1. p. 52, &c. and n. (Y). *Selden's Duello*, ch. 6. *Works*, vol. 3. p. 68.

NOTE XXXII. p. 50. (f).

THE reason why the fine for alienation was paid by the *feoffee*, was because the lands were chargeable in his

his hands for the fine ; and, consequently, as, on payment, the charge ceased, it was held at length that he only should pay it. See 2 *Inst.* 67. *F. N. B.* 235. A.

Though, from the nature of the thing, one should conclude that, as a licence was necessary to enable the feoffor to convey, it was but just that he should have satisfied his lord for the fine to empower him to transfer his feud to another. If he took upon himself to alien without a licence, when he must have known that a licence was necessary, it was certainly unreasonable to make the feoffee be answerable for his presumption. However, as in such case the lands were chargeable in the feoffee's hands, the feoffee paid the fine to retain them ; and as the lord looked to the lands as his security, so he accepted payment from him in whose possession they were. Thus, as at length the lord could not withhold his consent, or deny his tenant the power to alien, he only regarded the payment of his fine ; and, as the lands were chargeable, it signified not to him from whom he received it ; since, at the worst, he could have recourse to the tenements chargeable. The tenant, knowing that the lord could not withhold his permission, aliened without asking it : and, as the feoffee found his lands subject to the discharge of the fine, he paid it to exonerate them. Hence, it became usual for him so to do ; and, at length, it was expected from no other. When the lord, therefore, accepted the fine from the feoffee, he acknowledged the alienation, and consented to it. Hence, as our author observes, the feoffee had a title, though he originally came in by wrong.

NOTE XXXIII. p. 51. (b).

Of the power of the tenant to alien, and of fines, for alienation in England, see the *notes* to the thirteenth

teenth and subsequent editions of *Co. Litt.* 43. a. and b. 64. a. f. v. (6, 7, 8). 309. a. 2 *Bl. Comm.* ch. 4. p. 57. ch. 19. p. 287. *Wright*, 29. 43. 165. 169. *Dalrymple, F. P.* ch. 3. *Sulliv.* lect. vi. xii. xv. xvi. xliii. *Stuart's View*, b. 2. ch. 3. f. 2. p. 114. *F. N. B.* 175. A. 224. H. 225, 226. 235. A. 2 *Inst.* 66. 501. *Mill. View Eng. Gov.* b. 2. ch. 6. p. 371. *Post.* 67. 70.

It should seem that among the Saxons, alienation was allowed, unless expressly restrained by the gift. Yet, in some cases, it was necessary to obtain the consent of the lord, as appears from the circumstance of giving him a legacy, or *douceur*, for the purpose of obtaining it; and, indeed, such consent is often expressly stated to have been had. *LL. Alf.* 37. See 1 *Tyrr.* 295. *Somn. Gavelk.* 87, &c. *Sulliv.* lect. xxvii. p. 255. *Dalrymple, F. P.* ch. 3. f. 1. p. 90. *Customal of Kent*, in *Robinson and Lamb. Append. to Somn.* 198. 201—203. *Lamb. Per Kent*, 491, &c. *Pref. to 3 Co.* v. a. *Dissert. prefixed to Formul. Angl.* ii. n. (e).

From the necessity of this consent of the lord, it is clear that the lands so aliened were not merely *allodial*. They were *held of the lord*; and, consequently, the power of alienation was not, among that people, confined to allodial property. The necessity of this consent continued, even as to the mesne lords, till the time of the statute of *Quia Emptores*. In the will of Edward, the son of Henry III. (afterwards King Edward I.) which was made but a few months before his accession, we find this passage:—"E par ceo, primus a nostre seynt pere l'Apostle, ke il voyll ceste tenir, et fere tenir, e confirmer; E KE IL VOYLE PRIER NOSTRE CHERE PERE, KE IL VOYLE TENIR ESTABLE, & PERE
TENIR,

"TENIR; PAR TUT SON REAUME, E TUT SON POER,
 A QUEL PART KE IL SEYT, LES CHOSES AWAYNT NOMES."

This strongly resembles a clause or two in the will of *Ethelstan*, the son of *Ethelred*, which was made about two hundred and fifty years before; where he prays his father, for God's sake, and for St. Mary's and St. Peter's, that his will might stand. And again:—"Now pray I that all the great personages (*pyten*) who may hear my will read, both clergy and laity, that they be of assistance that my will may stand, SINCE MY FATHER HAS CONSENTED TO IT."

The congruity in the instruments of transfer, before and after the Conquest, will presently be noticed. Many instances might be selected in further proof of it. The anathema, so frequent in the Saxon wills, was not forgotten in the Norman. Some of these among the former were terrible. "He that bereaves, (impedes, or frustrates) my will, (says *Wolgith*) which by God's permission I have now made, let him be bereaved of these earthly joys; and may the Almighty Lord—cut him off from all holy men's communion in Doomsday; and be he delivered to Satan, the Devil, and all his cursed companions to hell's bottom, and there perish; (or be punished, or tortured,) with those whom God has cast off or forsaken, without intermission, and never trouble my heirs." (Will of *Wolgith*, A. D. 1046.) See *App. Semn.* 211. "*Et quisunque contra hoc venire presumpserit,*" (says the will of *Henry II.*) "*Indignationem et iram Omnipotentis Dei, et maledictionem ipsius Dei et meam incurrat.*"

The prayer of *Edward* to the Pope, seems to have been with a view to his personals. The church had assumed the power of disposing of the property of intestates

testates in what were called *pious* uses; but in those cases the clergy remembered the adage that "Charity began at home." Hence they gained the probate of wills (except in a few particular lordships). Could they have set a will, therefore, aside, the disposition would belong to themselves. It was, consequently, to some purpose to obtain the support of his holiness. Long after the statute of *Quia Emptores*, we find a prayer to the church, in wills, that the testament might be affirmed, in cases where no real property was disposed of. "*Et primus,*" (says the Earl of Essex, *A. D.* 1361.) "*n're tres honourable pierre in Dieu, q'totes cesbes choses soient faites solom n're volentie.*" See also the will of John of Gaunt. Before the time of Henry VIII. the *use* of lands only was devisable (except by custom); but the lords might have consented to the *alienation* of lands even before the statute of *Quia Emptores*; and Edward, the son of Henry III. devised his to trustees for the benefit of his children; and Edward the Black Prince, about a century afterwards, devised the profits of his lands and feignories, for three years, to pay his debts; and a devise very similar occurs in the will of his widow, Joan of Kent. Edward, the son of Henry, considered the consent of his father as requisite to give effect to his devise; and Edward the Black Prince expressly informs us, that the concurrence of his father (Edward III.) was previously obtained. "*Ensemble avec touz les issuez et profitz q. purront soudre & avenir de touz nos terrez & seignouris par trois ans apres ce qe dieux aura fait sa volunte de nous; LESQUELX PROFITZ N'RE DIT SEIGNOUR ET PERE NOS A OTTRIEZ P' PAIER NOZ DETTEZ.*" And in the will of his widow, Joan princess of Wales, there is the following

following passage:—" *Residuum, &c. ac omnia et singulos fructus, redditus et proventus. necnon jura et dominia quecumque* QUOS ET QUE CARISSIMUS FILIUS MEUS RICARDUS REX ANGLIE ET FRANCIE MIHI ET EXECUTORIBUS MEIS CONCESSIT ET DEDIT, POST MORTEM MEAM PER UNUM ANNUM HABENDUM PROUT LITTERIS SUIB INDE CONFECTIS PLENIUS CONTINETUR, *do, lego, et concedo, meis executoribus subscripsit, &c.* These wills are now published. See *A Collection of Royal and other Wills*, printed by Nichols, London, 4to. 1780. And as to that of Henry II. see also *Form. Anglic.* 421, No. 767.

Yet it was asserted by *Fortesque*, in the time of Henry VI. that a king of England could not devise his land any more than a subject could do so. *M.* 35 *Hen. VI. pl.* 33. *f.* 29. *b.* And indeed we find the feoffees expressly mentioned in the wills of Henry V. and VI.—the latter monarch referring also to a special act of parliament, which confirmed such disposition. Yet an act had before passed, *Temp. Ric. II.* enabling the king, his heirs and successors, kings of England, freely to make their *Testaments, &c.* *Rot. Parl.* 16 *Ric. II. V.* 3. *N.* 10. *p.* 301. and *Pref. to Coll. Roy. Wills*, iv. n. (*). and 4 *Inst.* 335.

During the Saxon period, the king's demesnes, or those lands which he had in his political capacity, were not alienable without the consent of the nation; and, therefore, they were either said to be granted in council, or witnessed and consented to by the great men. It were needless to cite instances of this; there is scarcely a charter extant, which is not a proof of the assertion. That of the annulling the grant of Baldred, king of Kent, of the manor of Malling in Suffex, to the church of Canterbury, and the subsequent

sequent gift of it by Egbert and Athelwolf, should not, however, escape remembrance, though so often the subject of remark. Baldred presumed to make the grant without obtaining the approbation of his people; and his grant was, in consequence, declared void. Egbert's was *with* their concurrence and assent: "*Quod viz. manerium* (says the charter of Egbert and Athelwolf,) *prius eidem ecclesiæ dedit Baldredus rex; SED QUIA NON FUIT DE CONSENSU MAGNATUM REGNI, DONUM ID NON POTUIT VALERE.*"

The property of the subject was sacred: In the grants of their kings of lands to which they had personally acceded in right of escheat, &c. they usually stated their title, and right to alien, "that it might be known that they gave what was their own." This was strongly expressive of the liberty of the individual, and of the limited power of their kings. Athelstan, in one of his charters, relates at length how he seized the lands as forfeited for treason.

Ethelred seized those of Ethelsig, as forfeited on outlawry for stealing swine. The declaration in his grant is curious; and is expressive of the manners of the times.

"This was the land forfeited at Dunmalton that Ethelsig forfeited to king Ethelred's hands. It was so then that he stole the swine of Ethelwine, the son of Ethelmere the alderman. Then his men did ride to him, and took them out of Ethelsig's house; but he fled to the woods, and men outlawed him; and awarded (or adjudged as forfeited, *ꝛeꝑeꝛt*,) to king Ethelred his lands and his goods. Then the king gave that land to his servant Hawes for a perpetual inheritance. And Wulfric, Wulfrun's son, had it

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afterwards of him in exchange for other lands that pleased him better, by the king's leave, and the testimony of his wisemen (prettenne; his council, his magnates)." See *Préf. to 3 Rep.* iv. b. v. a.

There are many things here which merit observation. And in the first place, we see that outlawry for felony was punishable with the forfeiture of lands, among our Saxon ancestors.

The stealing of swine too was, in those days, a crime of great atrocity. It was consequently guarded against by the severest laws, by reason of the then value of that animal, and of the ease with which it might have been stolen.

The flesh of swine formed one of the most important articles of provision among the inhabitants of Europe in those ages. Even the departed heroes in a state of happiness, according to the Icelandic mythology, regaled themselves on boiled pork! See the *Edda*, F.^o xx.

To pilfer the larder of king Chilperic, was certainly an offence of magnitude. The declaration, that even a courtier had purloined some of his hams of bacon, was enough to blast his reputation in the eyes of the king. (See *Mall. Nor. Antiq.* vol. ii. p. 110. n. A.)

However contemptible the hog and its herdsman may appear in our estimation, they were not so in former ages. The keeper of swine, as Ferguson remarks, was a prime counsellor at the court of Ulysses.

In later days, bacon was the chief viand of Europe. Since the Conquest, we find Philip Fitz-Robert giving, among other things, one hundred bacons to the king, for the wardship of the lands and
heir

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heir of Ivo de Munby, 1 *Mad. Excheq.* ch. 10. p. 324. *Mag. Rot.* 1 79. *Rot.* 11. 2.

The right of pannage, or keeping so many hogs in certain woods or wilds, was a privilege of importance. It is repeatedly mentioned in *Doomsday Book*; and was carefully protected in later days. See *Charta de Forestæ*, c. 9. *Barrington on the Anc. Stat.* 33, 4. *Manwoode's For. Laws*, ch. 12. *Flota, lib.* 2. cap. 80. *Somn. Gav.* 23. *Robins. Gav.* b. 2. c. 8. p. 264. See also *Gibson's Camd.* t. (Suffex) *Andredswald*: and note, the British name of *Andred* signifies *waste, uninhabited*; or, as the Saxons termed it, *weald, pealð*, which is of the same import. See *Owen's Welch Dict.* v. *Andred*. In this wood or wild it was that Sigebert, a king of the West-Saxons, was killed by a *swine-herd*, after having been deposed from his throne. See *Camd. ubi supra*, and 1 *Tyrr.* 226. *Et vide Matth. Westm. sub. ann.* 756.

In rude ages, when there remained extensive wilds, in which herds were suffered to range for food, the stealth of cattle was easily effected: hence the severity of the ancient laws for obstructing them. See *Roll. Anc. Hist.* b. 6. c. 1. f. 3. *Stuart's View of Soc. in Eur.* b. 1. c. 1. f. 1. p. 163. n. (13). *Falc. on Clim.* b. 6. c. 2. p. 343. *Stuart's Diff.* p. 1. f. 3. p. 27. and n. (4).

Should they even have strayed, the precinct into which they were traced was answerable for them, if it could not be shewn that they had proceeded further. This was the usage of Wales from the most remote times, and was confirmed by the stat. 34 and 35 *Hen.* 8. c. 26. f. 106. Such was the custom among the Irish, which received a similar approbation. (See *Camd. Brit. Customs of the Irish*; note

from Sir John Davys, p. 1043.) Such too was the law among the Highlanders in Scotland, so lately, at least, as the commencement of the present century. (See *Mill. View*, b. 1. c. 6. p. 127, &c.)

But to return: The manner of transferring lands among our Saxon ancestors is worthy of observation, as it tends to illustrate our present usages. Many of our rules and customs are to be traced to that remote period.

The first thing which here presents itself to notice is the livery of seisin. This indeed was common to all nations in rude ages. Possession was the strongest presumption, if not a proof, of propriety in unlettered times. To transfer that possession before witnesses was the first mode of conveyance. (See *ante*, 39. N. XXIX.) The particular usages of the Saxons, however, were very similar to the present. The twig and turf were the simplest method of livery; and by the twig and turf did they give seisin to the purchaser. When grants were made to the church, a turf was usually laid on the altar. This occurred so frequently, that it would be needless to cite instances in its support.

A tree growing on the soil was regarded as a part of it; hence, a branch of it served to give seisin. It was easier to break off a bough than to dig up a clod, and the former was often adopted. At length possession was given by delivering things which had no connection with the land intended to be conveyed: by symbols absolutely arbitrary and indifferent. When Ulphus king of Deira gave lands to the church of York, he "took the horn wherein he was wont to drink, and, filling it with wine, kneeled before the altar," and deposited it as a symbol of possession. In
after-

after-days we find an instance no less extraordinary. In the time of Henry III. William earl of Warrenne and Surry, on a grant made by him to the priory of St. Pancrace, near Lewes in Suffex, delivered seisin by the hair of his head: "*Per capillos capitis sui; et fratris sui Radulfi de Warrenne quos abscidit de capitibus suis cum cotello ante altare.*" *Mag. Rot.* 24 Hen. III. tit. *Sudsex. Mad. Formulæ Anglicanum, Dissert.* f. xiii. p. x. and *vid. Pref. Epist.* 1 *Mad. Excebeq.* p. xxix, xxx.

The horn and the locks of hair were chosen as expressive of respect; and, as they were religiously preserved, they remained monuments of the endowment, and perpetuated the remembrance of the piety of the founder, and of his deference to the church.

The northern nations were always celebrated for carousals and feasting; they therefore very naturally employed the art they possessed in decorating their cups; these were often of horn, and generally pretty capacious, even among the gods, as appears from the *Edda* itself. (F. xxv.) (and *vide Cas. de Bello Gall. lib. vi. c. 26.*) In the days of heathenism, they were frequently made of the skulls of their enemies. In Scandinavia and Scotland, they were usually of shells. In each instance they were beautified with all the skill of the age; and were esteemed as valuables by a people addicted to drinking and mirth. In Scotland, in the second century, we find "ten shells studded with gems," forming part of a present to the king of Sora, as an inducement to forego his intentions of hostility. (*Offian*, vol. i. p. 399. *Battle of Lora.*) Even in the eleventh century, we find a Saxon prince, Ethelstan, the son of Ethelred, giving to God and St. Peter (or, in other words, to the

church at Canterbury) a drinking-horn, which he had bought of the convent at Ealdminster. (See *App. to Soinn.* 198.)

Ulphus, therefore, conceived that he shewed the most unequivocal token of respect, when he laid upon the altar at York "the horn wherein he was wont to drink;" and, more especially, as he had "filled it with wine." These things are most forcibly indicative of the manners of the times, and, like "the day of small things," are not to be "despised."

When the great earl of Warrenne permitted his hair to be cut off by his brother, and gave it, in the name of seisin, to the priests of St. Pancrace, the compliment was felt and acknowledged. The northern nations of Europe were no less remarked for annexing the ideas of consequence, of respect, and even of freedom itself, to a length of hair, than they were for their love of festivity. It was the diadem of the kings of the Franks. *Hottoman* has a whole chapter on this head; see his *Franc. Gallia*, c. 9. See also *Spir. of Laws*, b. 18. c. 23. To cut off his hair was to depose him. To suffer a slave to let his hair grow, amounted to an emancipation. Even among the Gentoos, the cutting off the hair of a delinquent was to deprive him of his privileges; it implied the loss of his cast. (*Code of Gentoo Laws*, ch. 17. s. 2.) The clergy of St. Pancrace must, as Stuart remarks, have been enchanted with the politeness of that nobleman; *View*, 405.

The written instruments of transfer among the Saxons are no less deserving of our attention: and here the great similarity between them and the conveyance of the present day must be apparent to every one. "So unrefining," says the before-quoted writer,

writer, "are men of business!" See *Diff. Antiq. Engl. Const.* P. 3. f. 6. p. 200, l. n. (5); and *Bacon on Engl. Gov.* P. 1. c. 41.

The witnesses to them were numerous; and they were frequently said to be evidenced by the county, hundred, &c. (See *Dissert. Pref. to Formul. Angl.* f. xxii. *App. to Somn.* 195, 6. &c. 213. &c. *Lamb. Peramb.* 491. &c. 2 *Tyrr. Introd.* 67. *Somn.* 87. and *vide Bracton, lib. 2. c. 16. f. 38. a. 2 Bl. Comm.* ch. 20, p. 307.); in which courts they were generally inrolled. See *Somn.* 87. *Squire on the Angl. Sax. Gov.* f. 56, p. 157. and *vide ante*, 39, 40.

They were also, like the indentures of later days, of several parts; "and this writing is tripartite, or three-fold; (ἡ τριπλὴ γράμματα ἔχοντες ὅμοιοι.) One is at Christ-church; another at St. Augustine's; and the third hath Byrhtic himself." *App. to Somn.* 197. 216. *Formulare Anglic.* 176. No. 284. A power of revocation, or condition, was sometimes inserted. (*Somn.* 215.) In wills the wife often joined with the husband. (*Lamb.* 491. *App. Somn.* 213. *Form. Angl. Dissert.* f. viii. &c.) Many other things ask for notice; such as the limitation; as to one for life with remainder over, &c. (See *Pref. to 6 Co.* iii. &c. *App. to Somn.* 195, 6. 211. &c. *Lamb.* 491. &c.) But this note is already too far extended.

However, before we dismiss the subject, it may be proper to observe, that by the 75th law of Canute, whoever deserted his lord in battle, forfeited his lands, &c.; in which case the lord was to have back the lands he gave, or, if they were *boctand*, they were to go to the king. Hence, it appears, that lands, though not by *hoc* or charter, were nevertheless held of a lord, and, consequently, not allodial. (See *Dalrymp.*

P. P. ch. 1. p. 11. N. (6) to *Co. Litt.* 6. a. and (2) to 86. a.) See also the 11th law of the same monarch, by which *boecland* is forfeited to the king, *let his lord be whom he will*.

NOTE XXXIV. p. 53. (l).

It was the livery of seisin, or transmutation of possession, which gave effect to a feoffment; and, consequently, a feoffment could not operate where the possession was not changed: and upon this principle it is that one joint-tenant cannot enfeoff his companion. *Noy's Max.* 59. See *post.* 73.

A person cannot make a feoffment when he has not the possession to convey: nor can any one take by feoffment when the possession is already in him. See *Noy*, 59. *Perk.* f. 203. *Touchst.* 205. *post.* 69.

NOTE XXXV. p. 54. (m).

THE release here spoken of is by way of *mittre le droit*: as a release which operates by way of enlargement may be made to a person who has only a chattel interest; as a lessee for years, on his making an actual entry. (See *Litt.* f. 459. *Co. Litt.* 270. and notes, and *post.* 69).

NOTE XXXVI. p. 55. (n).

THIS is confined to a person who was disseised of an estate in fee-simple, and does not extend to a tenant in tail or for life: for if the tenant in tail or for life be disseised by two, and release to one only, it shall enture to both. See *Co. Litt.* 275. b. and *post.* 57.

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The reason of this difference is that, as the disseisor gives the immediate fee by the disseisin, it must be the conveyance of the right to the immediate fee also that can change the estate. If, therefore, the disseisee in fee, or the tenant for life and remainderman, release their right to one of the disseisors, it turns his wrongful estate in fee into a rightful one: But when the tenant in tail or for life release their right, they would convey a right to a different estate than that which was gained by the disseisin: For in order to turn the wrongful estate into a rightful one, the *right* which is conveyed must be commensurate with the *wrong*; If they are not equal in quantity, they must continue distinct, and the first estate remain unaltered.

NOTE XXXVII. p. 66. (p).

WHEN the tenant in tail makes a feoffment, the right of entail remains, and shall descend to his issue; and, consequently, such issue would be the rightful tenant to the donor. (See *post*. 116, 117. and *Hob.* 252 and 334; and see also *ante*, 25.) But when a tenant in fee-simple makes a feoffment in fee, no right remains in him; but the whole estate (since the stat. *Quia empt. terr.*) is transferred to the feoffee. See *Co. Litt.* 269. b. *post*. 85. (k) 133. N. LIV.

NOTE XXXVIII. p. 72. (u).

i. e. after assignment. See *Co. Litt.* 273.

But before assignment he might have taken one. See *Co. Litt.* 273. a. N. (1).

So his grantee may take a release from the reversioner. 2 *Roll. Abr.* 401. *Release* (B), pl. 8.

So, if a feme covert be tenant for life, a release to the

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the husband and his heirs will be good; for by marriage he has a freehold in her right. *Co. Litt.* 273.

NOTE XXXIX. p. 76. (b).

By confirming the *estate, lease, demise, or term*, the whole interest of the lessee is established; and a clause restricting it in point of time, after confirming it absolutely, would be repugnant. But if the land be confirmed for part of the term, the assent is, as our author says, but partial, and does not involve in itself the contradiction before adverted to.

But an estate of freehold cannot be confirmed, though by express words, for part of that estate; for an estate of freehold is intire, is integral, and indivisible. It does not consist, like a term of years, of an aggregate or number of separate portions of time; but is, of itself, a single and individual estate; and see *Co. Litt.* 297. a. and N. (1). and *Touchst.* 317.

NOTE XL. p. 79. (c).

THIS has reference to *Litt.* f. 534. which is to this effect: If a person be disseised, and the disseisor die seised, and his heir be in by descent, and then the disseisor and such heir join in a feoffment; such conveyance shall operate as a feoffment with respect to the heir of the disseisor, and as a confirmation with respect to the disseisee.

NOTE XLI. p. 80. (f).

By the *confirmation*, the lord strengthened or established the estate which the tenant already had; but by the *release*, he relinquished his own property, which the tenant had not before. These conveyances are essentially different: The former relates to

the estate of the tenant, the latter to the right or title of the lord; and see *ante*, 75. and *Finch. L.* p. 197, 8.

NOTE XLII. p. 85. (c).

THERE is an exception, however, to this in the case of a gift in tail; as a tenure is created between the donor and donee, by virtue of the statute *De donis*: The latter holding of the former, as the former holds over. *Brooke, Garde.* 87. *Estates*, 40. *Tenures*, 37. 96. *Kitch.* 146. a. *Litt. L.* 19. *Co. Litt.* 23. a. 2 *Co.* 91. b.

And if the donor grant his reversion over to a stranger, the donee shall hold of such stranger. *F. N. B.* 219. E. 2 *Co.* 92. a. and b.

But if lands be given to A. in tail, with the remainder over in fee to a stranger, the donee shall hold of the chief lord; as, in this case, the whole estate is conveyed, *Bro. Tenures*, 21. *Dyer*, 362. pl. 19. 2 *Inst.* 505. *Co. Litt.* 22. b.

If the tenant in tail has the reversion in himself; there, although the two estates continue distinct, yet, as he cannot hold of himself (see *post.* 152.), the tenure of the estate-tail is suspended; and he is tenant to the lord in fee. See 2 *Co.* 92. b. *Bro. Ten.* 84. 107. *F. N. B.* 143. A. 144. A. *Dyer*, 235. pl. 22. 20 *Viner*, Tenure (H, a), pl. 12.

NOTE XLIII. p. 98. (*).

THE utmost length of time that has been hitherto allowed for the contingency of an executory devise, is that of a life or lives in being, and one-and-twenty years afterwards. In cases, indeed, of a posthumous child,

child, it might perhaps be extended to a few months more. A limitation, says Mr. Hargrave, not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar to an entail, by fine or recovery, for a longer space. *Harg. n. (5) to Co, Litt. 20. a. 2 Bl. Comm. ch. 11, p. 174.*

NOTE XLIV. p. 117. (r).

BUT this reason applies only to those who were bound by such warranty; and, consequently, the propriety of urging the circumstance of warranty as an additional cause of such entry ceasing with respect to "all the three cases before mentioned," seems questionable: Since such a consequence of the warranty of the husband, in the first case, was eventual only, and not of necessity, as neither the entry of the wife or her heir was taken away, unless she or her heir was also heir to the husband; as otherwise they were not bound. As to the second case, the warranty of the ecclesiastic did not bind his successor; and, consequently, the reason did not hold as to him. The husband or prelate could not have entered themselves, as they were precluded from so doing by their own acts, and that whether the instrument had a clause of warranty or not: So that this consequence of warranty does not seem to be a reason, in the one case, but eventual or accidental; and, in the other, to be any reason at all. As to the third case, indeed, it is certainly a reason why the issue in tail should not enter, as the warranty descends on him; but it does not hold as a reason why the entry should be tolled of a remainder-man or reversioner, except in instances

stances in which they are also *the heirs* of the warrantor. It should seem, therefore, more accurate to say that the warranty in such feoffment is, in some cases, a further reason why the entry is taken away; *i. e.* in those cases where the claimant is *the heir* of the person warranting.

NOTE XLV. p. 120. (t).

THESE instances are—if a tenant in tail make a lease for years, and then *releases* all his right (606); or *confirm* the estate of the lessee to him and his heirs (607); or, after such lease, *grant* his reversion to another in fee, and the lessee attorn (608): Again, if my tenant for life lease for years, and then *grant* the reversion to another in fee (609); or if he *confirm* the estate of his lessee to him and his heirs (610); or if a tenant in tail grant for the term of his own life, and *releases* to the tenant for life and his heirs all his right (s. 612).

Sect. 611. is the case of a *feoffment* by the tenant for life.

A *release*, *confirmation*, or *grant*, can, from their very nature, convey only the right which the person so conveying has in the premises. The *feoffment* creates a *new fee*. (See *Watk. on Desc.* c. 5. p. 186.) In the former case, the rights of others are not affected; in the latter, the original estates which were portions of the old fee are divested, while the new estate so gained by the feoffment continues.

NOTE XLVI. p. 120. (u).

“ALL his estate:”—It should here be remembered, that in this case the tenant in tail expressly confines his intention of aliening to such estate which
he

he hath in the tenements to him entailed; and, therefore, shall be considered as passing no more than what he lawfully might convey; and the livery; being *secundum formam chartæ*, shall be restrained accordingly. See *Litt.* f. 613., and N. (1) to *Co. Litt.* 331. a. And see *post.* 273. (m). 330. (e).

NOTE XLVII. p. 121. (w).

“A LEASE for life:”—*i. e.* for the life of *another person*. The reason is, when he conveyed “all his estate,” as in the last case, he only parted with what he might lawfully have passed; which was an estate *for his own life*: Now, in such case, the title of his issue would not accrue till the estate which he had conveyed by livery would be utterly at an end; and, consequently, it could not interfere with the entry of such issue, as they could not be entitled till his death. But if he had made a lease for the life of another, it might possibly have continued after his own decease: If it had, his issue could not have entered; a discontinuance would have been effected, and they put to their action to recover. Another reason is, that in the former case the reversion was not altered; in the latter it was. See the text of *Litt.* and *Co.* upon it. 333. a.

NOTE XLVIII. p. 123. (x).

ANOTHER reason is given by *Littleton*, which is, that no one can discontinue the estate-tail unless he discontinue the reversion or remainder also; f. 625. Now, when the feoffment is made to the reversioner or the remainder-man in fee, in cases where there is no intermediate estate, the reversion or remainder is not altered; as the person to whom it is made was before

before entitled by right. But had there been an intermediate estate, or had the feoffment been made to a mesne remainder-man, the intermediate estate, or the ultimate limitation, would have been altered; and, consequently, a discontinuance would have taken place.

NOTE XLIX. p. 124. (y*).

THE case put by *Littleton* is—A woman inheritrix takes husband, and has issue a son; the husband dies, and she takes a second, who lets the lands to another for life; then the wife dies: the tenant for life afterwards surrenders to the second husband; and the question is, Whether the son by the first husband may enter upon the second, during the life of the tenant for life?

The second husband, by his grant for another's life, discontinued the estate; and, consequently, during the existence of such discontinuance, the heir of the wife could not have entered before the stat. of *Hen. VIII.* But the husband by such grant gained to himself the fee by wrong; and, consequently, was capable of taking a surrender from the tenant for life. The estate for life therefore ceasing, the discontinuance also ceased. If the second husband had had issue also, he would have been tenant by the curtesy again: for that being a rightful estate, and the fee gained by the grant for life a wrongful one, the law will suppose him in of the former; as it always prefers a less estate by right to a larger one by wrong. If he had had no issue, he would not, after the death of the wife, have any rightful estate at all. In either case his alienation was a forfeiture; and now the premises being again in

in his possession, on the determination of the estate for life, the heir of the wife may enter on him; as having, in the latter case, no rightful estate, and, in the former, by reason of such forfeiture. See *Co. Litt.* 42. b. 202. a. and b. 252. a. 338. a. and b.

NOTE L. p. 125. (z).

It has been observed before (p. 118), that no conveyance can pass the right of possession distinct from the right of propriety, but such as passes the very possession. Now, the very possession was here in the lessee for life while he lived, and, on his death, in the grantee of the reversion; on his entry; and, consequently, it could not be passed by the issue in tail, as it was never in him. As, therefore, the possession still continued wrongful in the grantee, the issue, on his title accruing on the death of his father, is not debarred from entering on him; and the grant of the father could not convey more of the right than he had a legal authority to convey, which was only for his own life.

NOTE LI. p. 129. (c).

"WHERE the entry is congeable." This expression should be attended to; as it is on this point which the doctrine, so far as it concerns the acceptance of the estate by the person out of possession, turns. It does not seem to have been sufficiently adverted to by Blackstone (3 *Comm.* 20); for when the entry is taken away, so that only a right of action remains, and the person out of possession takes the franktenement by *his own act*, he shall *not* be remitted; as it was his own folly to accept it. But, if his entry be *not* taken away,

away, but be lawful or congeable at the time of acceptance, and the estate accepted be not accepted by any mean which may operate as an estoppel, he *shall* be remitted to his ancient and rightful estate. See *Litt.* 693; and *Co. Litt.* 363. a. *Noy's Max.* ch. 18, and next page.

But, if the possession come to the proprietary without any fault or folly of his own, it matters not whether he have a right of entry or of action only at the time; for, in either case, he shall be remitted. But if he have neither the one or the other, he shall not be remitted; as if he have a mere right only for which he can have no action. See *Co. Litt.* 349. a. and b. and 3 *Bl. Comm.* 20.

NOTE LII. p. 131. (e).

"THE principal reason," says Mr. Butler, "for his being remitted, is that the person so remitted cannot sue or enter upon himself; so that in those cases where the possession is recoverable by entry, the remitter has the effect of an entry; and in those cases where it is recoverable by action, it has the effect of a judgment at law." See *note* (1) to *Co. Litt.* 347. b. and see also 3 *Bl. Comm.* 20.

NOTE LIII. p. 131. (f).

THE heir of the disseisor had the right of possession by the descent from his ancestor; and the disseisee could not devert that right by his own wrong. But when the disseisee himself afterwards died seised, the right of possession became fixed in *his* heir; the descent from *him* tolling the entry of the heir of the first disseisor; in the same manner as it became fixed in

the heir of the first disseisor by the descent from *his* ancestor. See *ante*, 21, &c.

NOTE LIV. p. 133. (g).

It is by reason of this supposed recompence that the heir is bound by the express warranty. He being chargeable only for those lands which descend to him from his warranting ancestor, or, as it is termed, in respect of the assets descending. The ancient implied, or feudal, warranty bound the heirs of the feigniory generally, and not merely with respect to the very lands which actually descended from the granting ancestor. The feudal obligations were reciprocal. The tenant and his heirs were bound to homage. The lord and his heirs were bound, as a consequence, to perpetual warranty. It was in consideration of the returns of the tenant that the lord was obligated to defend his lands; and, consequently, as the homage was done by the heirs of the tenant to the heirs of the lord, during the existence of the tenancy, the heirs of the lord were equally bound to warranty as the grantor himself, since they also continued to receive the considerations and returns on which the grant was originally made. But since the stat. of *Quia emptores*, the grantee holds of the superior lord, and no returns are due to the heir of the grantor after alienation; no dependance or connection continues between them: (See *ante*, 66. N. XXXVII.) No benefit accrues to the one, nor can protection be claimed by the other. Hence the heir is not obligated to defend the alienation of his ancestor, unless he be expressly bound; and that only in respect of the assets descending, or presumed recompence, from the very ancestor who entered into

the obligation. See further *Post.* 134. 5. 139. 142. 3. 4. 151. 2, 3, 4. *Britton*, c. 68. *Wright*, 152. *Notes* (1) f. 5. (8) to *Co. Litt.* 64. a. (1) to 67. b. (1) to 105. a. (1) to 365. a. (1) to 384. a. and *Post.* 140. N. LVI. *Sulliv.* lect. xii. 2 *Inst.* 11, &c. 2 *Bl. Comm.* ch. 20. p. 300.

NOTE LV. p. 135. (k).

THE reason of this is, that the recompence cannot descend to the heir during the father's life; and, consequently, till his decease the son cannot be estopped. If he does not claim during the life of the father, he is supposed to have received the recompence; and shall therefore be bound; and see *Glanv. lib.* 7. c. 3. f. 49. b.

NOTE LVI. p. 140. (q).

As the stat. 4 *Ed. I.* confined the warranty created by the word *dedi* to the life of the feoffor, unless the lands were given to be held of him and his heirs; it follows, that, since the stat. of *Quia emptores* (18 *Ed. I.*) forbids such reservation of tenure, by ordaining that the feoffee shall hold of the lord above, the heirs of the feoffor cannot now, in any case where the fee is conveyed, be bound to warranty by force of that word. The obligation on the heirs can now, it is said, be no otherwise created than by the word *warrantizo*, or warrant. *Litt.* f. 733. *Co. Litt.* 384. a. 2 *Bl. Comm.* ch. 20. p. 300, 1.

In Mr. Butler's note (1) to *Co. Litt.* 384. a. an error has accidentally occurred; and which the writer of the present note has been requested by Mr. Butler to correct. When the warranty is there spoken of

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which was anciently implied by the word *dedi*, it is said, "the warranty in this instance was therefore a consequence of tenure; and so necessary a consequence of it, that where an express and qualified warranty was introduced, it did not restrain or circumscribe the *express* warranty." From the context it must be necessarily apparent, that the word *express* was misprinted for *implied*.

NOTE LVII. p. 141. (t).

DESCENT was always favoured in law. The heir was never suffered to be disinherited by presumption. The feud or tenancy was to be kept entire and unimpaired; as the heir was "to sit in the seat of his ancestor, and to serve the king and the commonwealth in as good estate as his ancestor did." (See 6 Co. 17. a.) And hence also those charges on the lands which the tenant was enabled to effect, (as a rent-charge for instance,) as they impaired the inheritance, and lessened the emoluments or revenues of the heir, were said to be *against common right*;—as inimical to the policy of the times. See *Gilb. on Rents*, 17, 18. 133.

NOTE LVIII. p. 142. (u).

THE chief distinction between lineal and collateral warranties consists in this: when the person on whom the warranty descends (who must always be the heir at common law) might possibly claim the lands *as heir to the warrantor* (whether as heir lineal or collateral), then the warranty is *lineal*. But when the person on whom it descends, does not claim *the lands as heir to the person warranting*, then the warranty is *collateral*.

collateral. See *Mr. Butler's Notes* (1) to *Co. Litt.* 370. a. and (2) to 373. b. and *Post.* 144. (a). 145, 146.

Lord Chancellor *Cowper* said that "a collateral warranty was certainly one of the harshest and most cruel points of the common law; because there was not so much as an intended recompence; yet he could not find that chancery had ever given relief in it." 10 *Mod.* 3, 4.

NOTE LIX. p. 143. (*).

THE tenant having done homage, the obligation continued during his life; and although he had parted with his tenancy, yet his promise of amity was not annulled. See *Co. Litt.* 65. a. *Sulliv.* lect. xii. p. 117.

NOTE LX. p. 143. (y).

IT is generally conceived that it was from the animosities so usual in the middle ages between the feudatories, that the term *feud* became expressive of the very animosities themselves. Hence, say they, came the term of *deadly feud*; it was significative of the rancour, the enmity, and avengeful spirit which the feudatories so frequently bore to each other. But, notwithstanding the weight of names in favour of this etymology of the word, the derivation given us of it by *Somner* (on *Gav.* 107.) seems, I think, much more satisfactory. He considers the word *feud* (thus applied), the *fæhð* of our Saxon ancestors, to be compounded of the Gothic terms *fab*; i. e. *hostis*, *inimicus*, or, as we still say, a *foe*; and of *bode*, *bade*, &c. i. e. *conditio*, *status*, *qualitas*, &c. "together

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ther importing the condition of enmity in the person who bears it;" and see *Cowell*, voce *Feed*.

NOTE LXI. p. 146. (c).

THE reason of this is, that the eldest son being the heir at law of the middle one, the warranty descends on him; he therefore is bound by it, although he have no assets; and this by reason of its being *collateral*: and it is collateral to the eldest with respect to the estate-tail, as he does not claim the estate-tail as heir to his middle brother, but immediately from his father. But it is said to be *lineal* to the younger, as by possibility the middle brother might have been seised. See *Litt. f.* 708, and *F. N. B.* 212. H. I.

NOTE LXII. p. 147. (d).

THE daughter cannot possibly convey her estate through the son, but must take immediately from the father; the warranty of the son, therefore, must necessarily be *collateral* to her; and, consequently, she may be bound by it. See *ante*, 142. N. LVIII. and (w).

NOTE LXIII. p. 148. (e).

SEE *ante*, 135. N. LV. But here the reason is the minority of the heir as disseisee, and having in himself the *right of possession*; and, consequently, by his entry the estate to which the warranty was annexed is defeated and gone, the warranty not interfering with his *right of entry*. But had he had only a *right of action* he would have been bound; as the warranty would have been an utter bar to any action brought, though it would not preclude him from entering.

NOTE

NOTE LXIV. p. 149. (f).

ANOTHER reason is given by *Sir Edw. Coke*, which is that a warranty cannot be created without deed; and a *will* in writing is not one. *Co. Litt.* 386. a. and see the Case of the Earl of Darlington, v. Pultney, in *Cowp.* 260.

NOTE LXV. p. 152. (b).

SEE *ante*, 88. (n). and see also *Dalrymple, F. P.* ch. 5. s. 2. p. 208. *Kaims's Brit. Antiq.* cff. 4. *Hale's Comm. Law*, ch. 11. p. 258, and 260.

If the second brother had received the feud by grant from his father or elder brother, and died without issue, it would have gone to his younger brother; but if he had taken it by the grant of a stranger, the eldest brother would have succeeded. Hence sprung the distinction still recognized in the Scotch law, between the heir of conquest, and the heir of line. "The feudal law," says *Dalrymple (ubi sup.)*, had a peculiar aversion at joining again the property and superiority in one person, when they had been once disjoined. The whole system was built on the distinct rights of superior and vassal; and the blending these two characters in one person, appeared to be the blending of contrary qualities together." In the case of the stranger there was no danger of this junction. Such was the law of England so late as the time of Edward I. and, as Sir Matthew Hale remarks (*Comm. Law*, ch. 11. p. 258, 9.), it has been rather antiquated than altered. But it should seem to have been the opinion of the justices in the reign of Edward I. that, in case the eldest brother had had

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issue at the time when he received homage of the second, such issue should not have been precluded from claiming on his death; though it would have been a bar to his issue who were born afterwards. See *Fitzb. Abr. t. Avowrie, pl. 235*. The reason of this opinion does not appear; since the issue, though born before homage, could not claim but as heir to him *at his death*; and, consequently, their title was equally subsequent to the receipt of homage, as if born afterwards.

OF COPYHOLDS.

NOTE LXVI. p. 155. (a).

IF the principles of our laws relative to freehold property are so evidently deducible from a feudal origin, as the preceding part of this work has so incontrovertibly evinced, to a feudal origin must we necessarily attribute the principles of our laws relative to copyhold tenure. In this latter species of property we find the feudal usages and rules in almost a native purity: so that we might, indeed, "conclude, that had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestibly prove the very universal reception which that northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our

our very villeins and bondmen." 2 *Bl. Comm.* ch. 22. p. 367.

The barons, possessed of large tracts of land, divided a portion of them among their followers. A portion also they reserved to themselves; and this was termed their demesnes. Parts of this again they granted out in small allotments to the lower orders of their dependants, to be cultivated for the emolument of the lord, or under certain services which were suitable to the husbandman to return. These were held at his will, and resumable at his pleasure. While the tenant, however, conducted himself faithfully, and fulfilled his conditions and returns, he was suffered to continue in the possession of the estate. If, indeed, he failed in these, his interest, of consequence, became forfeited to the lord.

When the tenant died, his children, dependant upon their industry in rustic employs for support, and bred up under the protection and in the interest of their lord, were often permitted to retain the spot which their father had cultivated; and succeeded on the conditions under which he had held them. This seemed reasonable and just. It was conceived hard to deprive the children of a faithful vassal of the scanty pittance they might reap from succeeding him. This became, therefore, frequently practised; and, in many manors, this ripened into custom. The common law, always friendly to freedom, countenanced every measure which favoured it, and which tended to make the tenant less dependant on his lord. The conditions on which the vassal held his copyhold, became in time fixed in their nature, though perhaps not always so in their duration and extent; and it thence became usual to grant such an interest to the
tenant

tenant and his heirs, yet subject to the right of re-sumption by the lord. The tenant, notwithstanding such descendible estate, was still, therefore, said to hold at the lord's will; and his heir was necessitated to be regularly admitted to the tenancy. He acknowledged the gift, and was grateful for the renewed munificence of the lord. He accepted the seisin, and paid his fine. (See *ante*, 24. N. XXII). Should the lord, indeed, have required an exorbitant fine, the heir would have been disinherited; but this the law at length prevented, and confined his demands within the limits of justice, and regulated them by the value of the lands to which the heir ought of right to succeed. As the tenant held only at will, at least in the consideration of law, he could not transfer his interest to another; at the most he could only relinquish his own right to the premises. He therefore returned them to his lord. When a copyholder wished to transfer his estate, he communicated those wishes to the lord, who often complied with his request, and accepted his resignation under confidence to regrant the estate to the person he was desirous should succeed him.—In the reign of King John, we find a freehold so transferred through the medium of the king:—Walter Croc released to the king and his heirs the moiety of the barony which was his uncle Walter Britton's; to the end that the king would be pleased to enfeoff Richard Briewerre thereof; to hold to Richard and his heirs of the king and his heirs *in capite*: “ITA UT RICARDUS BRIEWERRE ET HÆREDES SUI TENEANT MEDIETATEM PRÆDICTÆ BARONIÆ.” *Mag. Rot.* 2 *Jo. Rot.* 7. a. Dorsete and Sumersete. *Mad. Baronia Angl.* b. 3. c. 4. p. 230. (1).—This also becoming more frequent, and

and the connection every day relaxing between the lord and his tenant, the returns and duties becoming more fixed and certain, and the advantages of alienation perpetually presenting themselves; the law countenanced the usage, and often enforced its compliance. Still, however, a regular resignation, or surrender, by the old tenant, and a regular acceptance or admission of the new, were requisite: And this form must to this day be adhered to.

The history and progress of these tenures, their consequences and incidents, are already ably and clearly deduced and explained, particularly by Mr. Justice Blackstone (see his *Considerations on Copyholders*, in his *Treatises*; and his second vol. of *Comment.* ch. 9. and 22.); and will be occasionally more fully entered into in the course of these Annotations, under their respective heads.

NOTE LXVII. p. 156. (c).

COPYHOLDERS are generally supposed to have been originally villeins; but this opinion has been questioned by Lord *Loughborough*. See *Dougl.* 724. n. (2). See *Past.* 292. N. CXLI. Mr. Just. *Wilmot* considered them as forming "a middle estate between freeholders and villeins." See 3 *Burr.* 1543.

NOTE LXVIII. p. 156. (f).

BUT that not simply and dependant upon the caprice of the lord; but they are *tenants at will* "ACCORDING TO THE CUSTOM OF THE MANOR."

They are so far tenants at will, however, that the freehold remains in the lord, and their possession will
cause

cause a *possessio fratris* in him. See *Watk. on Desc.* ch. 1. f. 2. p. 51. *Post.* 308.

There are other estates which are held "*according to the custom of the manor*," but not "*at the will of the lord*." These are frequently called customary freeholds; though perhaps not very properly, as the freehold even of such estates remains also in the lord of whom they are held. See *Blackst. Confid. on Copyb. Tracts*; and 2 *Comm.* ch. 9. p. 149. 3 *Burr.* 1273. 1 *Salk.* 365. 3 *Salk.* 100. *Cartb.* 432.

NOTE LXIX. p. 157. (b).

SEE *ante*, 155. N. LXVI.—As the copyholder held only at will, he had nothing to transfer; he could only relinquish his title to the premises. Besides, a person could not in those times, for the reasons we have mentioned (*Introd.* xiv. and *ante*, 12. N. XII.), be put into the tenancy but by the approbation of the lord: It followed, therefore, that the old tenant should surrender up his interest, and the new one be regularly admitted.

But when a person had a right to, or an equitable interest only (when such equitable interests were permitted) in a copyhold estate, such person was not the tenant of the manor. No surrender of such right or interest was necessary on its conveyance; for none could be made: He therefore might transfer it to another by deed:—Nor would he to whom it was transferred require any admission, as he did not become tenant to the lord. The tenant was him in whom the legal estate was vested; and by the transfer of the equitable interest the tenancy was not altered; hence no fine can be due on such transfer, as there is no change

change of tenant effected, nor, consequently, any admission required.

Thus, when any one is wrongfully admitted to a copyhold, he becomes tenant to the lord; and he who has the right may release it to him by deed. 4 *Co.* 25. b. *Watk on Desc.* ch. 1. s. 1. p. 31. and *Post.* 192, 3. 311.

So one joint-tenant may release to his companion; for each is seised *per mie et per tout*, and the tenancy is not altered by the secession of the individual. *Co. Litt.* 59. a. n. (3). *Post.* 289: 330. N. CLXXIV.

And, for the same reason, a copyholder may release to his lord:—For this is no substitution of a person into the tenancy, but a relinquishment of his own interest or claim; and the lord is not injured but benefited by such act. 1 *Leon.* 102. c. 135. *Hutt.* 65. and *Post.* 300.

So if a copyholder surrender on condition, he may release such condition by deed; for the tenancy remains as before. *Cro. Jac.* 36. pl. 11.

But the release of a copyholder cannot operate in any way but by extinguishment, and that when made to a person whose possession was lawful; and therefore it would not be good if made to a disseisor, &c. 1 *Leon.* 102. c. 135. and *Post.* 193. 300. 311.

So a person having only an equitable interest may assign or devise it without a surrender. 1 *Atk.* 388, 390. 2 *Atk.* 38. 3 *Atk.* 75. 1 *Ves.* 121. 489. and see 1 *Hen. Blackst.* 461. and *Post.* 177. N. LXXXII.

So of a mere authority or power. *Cro. Jac.* 199. pl. 30. 2 *Wilf.* 400. and *Post.* 274. (o).

So, by statute, the copyhold estate of a bankrupt may be transferred by the commissioners, by bargain and sale inrolled. See 1 *Cooke's Bankr. Laws*, ch. 9.

NOTE LXX. p. 157. (k).

THE right of alienation being now established, the surrender is considered as a form: A court of equity will therefore frequently supply its deficiency.

But equity will not interfere in a capricious or arbitrary manner. If the necessity or justice of the case does not demand it, the claimant must be left to his fate; and the heir is not to be disinherited where it would be consistent with justice that he should succeed.

In cases of moral obligation, as a provision for a wife or children, the court will yield its assistance and dispense with the form. 1 *Ves.* 228. 2 *Ves.* 165. 582. 1 *Atk.* 386, 7. 390. 3 *Atk.* 182. 585, 6.

So in the instances of creditors: 1 *Ves.* 215. 2 *Ves.* 165. 582. 3 *Atk.* 77. 182. Or of a purchaser for valuable consideration: 2 *Vern.* 165. and *Fisher on Copyb.* 138. ch. 16.

But in favour of a person for whom the testator was not obligated to provide, as in case of a devise to a stranger, a surrender will *not* be supplied. 2 *Ves.* 582. 1 *Abr. Eq. Ca.* 122. *Copyb.* (B).

If a devise be to a wife for life, with remainder to a stranger (as to a nephew or niece), the court will aid the particular devise to the wife only, but will not supply the surrender as to the remainder over. 3 *Bro. Chanc. Cas.* 170.

See further, as to the cases in which a surrender will be supplied or aided in equity, *Com. Dig. Copyb.* (P. 2). *Viner Copyb.* (M. 2). 1 *Pr. Williams*, 60. and n. (1) to Mr. Coxe's edition. 1 *Eq. Abr.* 122. *Copyb.* (B).

NOTE LXXI. p. 157. (l).

THIS should have ran—The lord is not compellable to make a *grant*. The case in *Moore* was, a custom was set up to compel the lord to grant, on the death of a tenant for life, an estate for life also to the eldest son ; or, if no son, to the daughter ; and so *in perpetuum* : which custom was adjudged ill. (The ixth sect. of *Mr. Butler's* note (1) to *Co. Litt.* 290. b. on the right of renewal of leases for life, may be here consulted ; and see *Post.* 323.)

NOTE LXXII. p. 157. (n).

THE power of compelling the lord to admit the surrenderee was first assumed by the courts of equity. *Mr. Just. Blackstone* conjectures, with much probability, that it was coeval with the introduction of uses with respect to freeholds. See 2 *Comm.* ch. 22. p. 366. Even so late as the time of James the First, it was adjudged, that the *surrenderee* could not maintain an action against the lord for not admitting him. (*Cro. Jac.* 368. *pl.* 1. and *Moore*, 842. *pl.* 1137. and *Post.* 291.) Yet it was said that the *surrenderor*, might have brought it. (See *Lex Cust.* ch. 17. p. 160. *Harg.* n. (6) to *Co. Litt.* 59. b. and *post.* 291.) A *mandamus* will now, however, lie to compel the admission of a surrenderee (2 *Durnf. and East* 484.) ; though the court has refused it in the case of an heir at law, upon the ground that he had as good a title without admission as with it, against all but the lord. (See 2 *Durnf. and East* 197, 8.)

And

And even in the case of copyholders who hold of the king; they may now insist on their admittance: And the order for the stay of admission, which was once made, is now dissolved and abrogated. See *a Burt. Excheq* 19. who cites *Lane's Rep.* 20. (*Case of York and Ailein.*)

NOTE LXXIII. p. 158. (p).

WHEN the heirs of the tenant were, through the munificence of the lord, permitted to enjoy the estate, still were they subject to his will, as their ancestor had been before them. It followed, therefore, that as their succession was optional, the pleasure of the lord directed the descent: And thus the custom of the manor was at length to regulate the mode of succession.

The inconveniency of different rules was presently discovered, and the propriety and expediency of reducing the laws of a kingdom to an uniform standard was consequently apparent. The rules of descent as to freeholds became ascertained and acknowledged, and those rules were considered as the common ones of the country, and obligatory in all cases where the claimant could not satisfactorily prove that he had a particular one to guide him. Whenever that proof failed, the common law pointed out the descent; as when he could not evince an exception, he, of consequence, fell within the rule. Thus the customary provisions were taken strictly: If the custom said that the youngest *son* should succeed, it did not follow from thence that the youngest *brother* should do so: There being no custom therefore as to him, the succession of the brothers was regulated by the general law. See the case of *Denn d. Goodwin et al. v. Spray*, 1 *Durnf. and East* 466. and the books there referred

referred to, and *Com. Dig. Boro' English*; and *Copyh. (K. 4)*. See also 5 *Durnf. and East*, 26. *Roe v. Parker*.

NOTE LXXIV. p. 162. (x).

THE possession of a lessee for years is always considered as that of the freeholder or lessor, or his heirs: And it seems to be the better opinion, that if the estate once becomes vested in the heir so as to cause a *possessio fratris*, it shall not be considered as divested again by the termination of the lease for years. If, on the death of the ancestor, it is notorious that the possession is in the heir, the end is answered, and the law satisfied. See *post*. 286. N. CXXXII.

NOTE LXXV. p. 163. (a).

THE powers of an heir over the estate before admission have long been very different from those of a surrenderee; though originally, even the heir had no authority over the inheritance till he had obtained a regular seisin from the lord: and this held equally as to freeholds. (See the *Introd.* xvi. *ante*, 24. N. XXII. and *post*. 230. N. C.) The heir, before his admission, is now considered as tenant as to every one but the lord;—the surrenderee was said to have nothing in the premises till admittance; neither a *jus in re* nor yet *ad rem*. The heir might have entered and taken the profits (see *ante*, p. 162. (z);—) but the surrenderee could not do so. (*Cro. Eliz.* 349. See 2 *Wilf.* 13. 5 *Burr.* 2770. *Post.* 275.) He has now, however, an equitable interest which he may devise (see *Preced. Chanc.* 320. 1 *Durnf. and East*, 601.) or assign. (1 *Durnf. and East*, 484. *Post.* 285. N. CXXXI.)

CXXXI.) His subsequent admission will have relation also to the surrender, and give effect to his mesne acts. (See 1 *Durnf. and East* 600. and see also *post*. 289. (d).) But, till actual admittance, he cannot regularly surrender to another, as he has no legal estate in the premises. (See *Cro. Eliz.* 349. and *post*. 275. 283. N. CXXX.) The heir, however, having the legal estate cast upon him by the law, may surrender on satisfying the lord for his fine: His admission, in these cases, is for the benefit of the lord; and therefore the lord may waive it if he pleases. So the heir of a remainder-man or reversioner may surrender before admittance, as well as if it had been an estate in possession. (*Cro. Eliz.* 504. 662. and see *Cro. Jac.* 36. pl. 10. and *post*. 281. N. CXXIX.) And as the heir may surrender before admittance, so he may take a surrender from another tenant out of court. (See *post*. 288.)

NOTE LXXVI. p. 163. (b).

It does not, I think, appear that the lord is anywise obliged to accept the surrender of the heir before the payment of his fine. The lord might have compelled him to be admitted, or seize his lands. The waiver of that admission is in favour of the heir; and it ought not to be turned to the prejudice of his lord. If the lord accept the surrender, and admit the *cestuy que use*, it should seem that he may bring an action of debt or *indebitatus assumpsit* for his fine. See *post*. 291. N. CXL. 308.

NOTE LXXVII. p. 163. (d).

THE particular limitation and the remainders over form together but one estate in law:—But one admission

sion therefore can be requisite; and, consequently, but one fine can be due. This fine may be assessed on the admission of the particular tenant, and proportioned to the interests of the several claimants who may pay their shares on coming into possession. If the whole fine, indeed, be paid on the admission of the particular tenant, there can be no portion of it due on the accession of the remainder-man. (See *Watk. on Desc.* ch. 1. s. 1. p. 21. n. (w). s. 2. p. 50. n. *Kitch.* 122. 1 *Burr.* 212, &c. and *post.* 194.)

But on the surrender of a remainder to a person to whom it was not originally limited, that person must be admitted and pay a fine. For though the admission of the particular tenant was the admission of the original remainder-man, it was not of the purchaser. (See *Cro. Jac.* 31. pl. 1. *Cro. Eliz.* 504. pl. 29. and *Fisher on Copb.* 86.)

So it should seem, that on the decease of a remainder-man, during the existence of the particular estate, his heir should be admitted and pay his fine; and see 1 *Burr.* 213.

NOTE LXXVIII. p. 164. (e).

THE inconveniency of exceptions to the general laws of a state has been in some degree adverted to when speaking of Customary Descents. (*Ante*, 158. and N. LXXIII.) The confusion and uncertainty which necessarily flow from a contradiction, or even variety of local customs, must be deeply felt in the intercourse between members of the same society.— This consequence has been much more generally experienced upon the continent than in this kingdom, as their customs were more variant and extensive.—

When the legislature enacts a general law, it expects

a general compliance: The rule is prescribed to the subject; and the subject should regulate his conduct accordingly. The inference, of necessity, must be, that all persons and all kinds of property are comprehended within its injunctions, unless an exception in their favour can be satisfactorily adduced. If no acknowledged right or tolerated usage be infringed; if no injury arise to the privileges or property of an individual with whom it did not intend to interfere; there can be no reason why its rules and obligations should not attach. If, indeed, the consequences of its extension to particular persons or places would be attended with injury to their rights or privileges,—such law cannot then be *presumed* to embrace them: In these cases it would be requisite, that such law should *expressly* include them; as the laws can never be *intended* to do injury to any. If, therefore, the interest of the lord be not prejudiced; if no injury accrues to the copyholder any more than under the like circumstances accrues to the free;—copyhold tenements must be equally within the public acts of the state as freeholds are.

NOTE LXXIX. p. 165. (g).

IT is very generally asserted in our books, that an estate-tail was not known till the statute *De donis*. (13 Ed. 1. *ft.* 1. *c.* 1.) All estates of inheritance, we are told, were, prior to that act, either in fee-simple absolute or conditional. Positions and assertions like these must necessarily excite surprise in him who would look only into the principles of feudalism, and the statute we are speaking of, for their elucidation. When he considers that, from the very words of that very statute, the very limitation must have

have existed before that act equally as afterwards ; that only particular privileges and incidents, of alienating in fee, of charges, or forfeiture, were, under certain circumstances, before admitted, and that the statute only abolished them : He would be led to ask with some astonishment, How could the existence of an estate-tail (call it what you please, he would say ; the *term* indeed might not have been known, but that could make no alteration in the nature of the estate : We speak of *things* : We stay not to cavil about *words* and *names*) ; How could the existence of an estate-tail before that statute be denied ? You admit that the limitation in both cases was alike ; each was to a person and the heirs of his body. The difference then was only in the privileges and incidents annexed to the estate. But where was the difference before those incidents existed ? And was it not long after the custom of granting a feud to a person and the heirs of his body, that the power of alienation was permitted ? Those privileges and incidents were effected by degrees ; and, consequently, the estate once existed without them. In that case, the difference you speak of was not known ; and, of consequence, the estates were the same : And how then can you affirm that the estate-tail was not prior to the statute ? That it was unknown at a time when it flourished with its purest influence ?

The dissipation or prevention of error is one way of establishing truth. Many are the misconceptions and prejudices which the student, in all sciences, has to combat in his progress towards knowledge. In that progress he will often find that the most difficult part of learning is to *unlearn*. He will soon perceive that many of the assertions of the *wise* had their

origin in ignorance. He will soon therefore perceive also, that assertion must be attended to with caution. He must scrutinize and investigate; he must not subscribe too implicitly to positions which he cannot assent to from a conviction of their truth. He must hesitate; he must reflect. He may not indeed be able to adopt, with *Montesquieu*, the words of *Correggio*, and to exclaim, "*And I also am a Painter*:" But he too should feel that he has powers and rights which Heaven has given him to exert; and that so long as infallibility is not the portion of others, so long must the right of investigation remain in himself. He should regard a blind acquiescence in arbitrary assertion; an implicit reliance on the *authority* of great names; as the bane of every thing rational. Shall he behold with jealousy the smallest portion of power which his state has delegated; and shall he not survey with disdain; shall he not concentrate his energy to oppose that tyranny which would shackle his intellect; which would enslave his very soul? Yet how often does the system arise, and, with the Tyrant's frown, demand credence from all, which has only for its basis the dictum of a pedantic or prejudiced individual? Upon assertions and positions uttered without proof, and adopted without enquiry, how often has contradiction been piled upon contradiction, and absurdity upon absurdity, till truth has been driven out ashamed, and confusion and error usurped the heart of man!

The position, however, here spoken of, that all estates of inheritance were, before the statute *De donis*, either in fee absolute or conditional, had apparently its origin from a purer and more commendable principle; not from the arbitrary assertions of ignorance

or misconception, but from the desire, which even then prevailed, of rendering estates alienable for the furtherance of commerce, or for purposes equally conducive to the happiness of mankind.

Let us then look into the History of Entails, and endeavour to emancipate the doctrine from its seeming inconsistencies and contradictions.

Feuds were given for life before they were granted to a person and the heirs of his body; they were granted to a person and the heirs of his body, before they were granted to a person and his heirs general or indefinite. The *Descendants* of the feudatory were admitted before his *collateral* relations (See *ante*, 11. N. XI. 17. N. XV.): An estate tail therefore must necessarily (in reality, though not in terms) have preceded an estate in fee-simple: For what was the *feudum novum* but an estate tail in effect? (See *ante*, 10. &c. 365. N. XV. *Somner's* says (*Gavelk.* 102.), that *Beneficium* was *Feudum's* elder brother; and was not the estate-tail the elder brother of the fee-simple?

We learn from the statute itself that the limitation was the same before that act, as has been used in subsequent times: But, prior to that period, the tenant had the power of aliening in fee on issue had. This seems to have had its origin, in the favour which the common law, even then, showed to alienation, for the purposes of commerce, and the provision for the younger branches of a family. To enable a man to alien to another and his heirs general (*in perpetuum*), who had himself but an estate to his own descendants, was evidently a most flagrant violation of the grant; and so the statute *De donis* considered it. So barefaced a fraud on the reversioner could only be countenanced by the law, from the circumstance of its

general utility in respect to the circulation of property in land; and most probably was very gradually effected. But, as commerce, which previously to that time began to flourish, and the Crusades, which previously also had maddened Europe, rendered restraints, of all kinds, on alienation, inconvenient, niceties on this head were not attended to; and the lords, absorbed in the ardour of avenging the cause of Heaven, became more regardless of their rights of reverter which were attached to feignories they were about to dispose of, or which, being temporal, they affected to despise.

But when this *furor* subsided in Europe; when the barons began to see the folly and presumption of fighting the battles of the Lord, to the destruction of mankind; when they discovered, from the most afflicting experience, the vanity of attempting the regaining of Palestine; when they found the inutility even of their partial success; when they reflected that to benefit mankind was as acceptable to Heaven as to destroy them; that truth was more rapid in her progress as the sword became sheathed; that their own welfare and happiness were as justifiably regarded, as the enthusiasm, the arts, or rapacity of the priesthood; that a barony in Britain was possessed of more real advantages than an empty title, a shaken fortress, or a portion of the sterile sands of Judea; when they became satisfied with their own country, and attended to their own necessities and pleasures; they then became more regardful of their rights. The frauds which had been committed on them by the alienation of the tenant were noticed and condemned; and the lords, mindful of their own interests, and anxious to continue their property unimpaired to their

their descendants, obtained this celebrated statute* which abolished the power of alienation in the tenant, &c.

This statute, therefore, so far from creating a new estate, "AUT RE AUT NOMINE," says *Sir Martin Wright* (189.)—only restored the original one to its wonted vigour.—It only abrogated the privileges and incidents which had been from time to time annexed to it, and which were then deemed merely extrinsic and adscititious.

The right of primogeniture had been long established in England (at least as to military tenures). When the limitation was to the heirs general, or to the heirs male of the donee, the eldest son succeeded to the exclusion of the rest. This was equally the same in the case of a fee-simple as of an estate-tail. But as, by this statute, the estate could not be aliened from the eldest son, nor charged in his hands, it was transmitted entire and unimpaired. Hence the aggrandizement of the greater families, and the other consequences so favourable to aristocratic pride and ambition. These consequences, with the restraints on alienation, and the manifest injury to the younger

* 13 Ed. I. A.D. 1285, which was only about five or six years before the expulsion of the Christians from Palestine; which happened in 1291. So early as the reign of Henry II. the power of alienation was assumed by those who were minded to engage in the *Holy Wars*. The intervening period, a period of upwards of one hundred years, are we doubtless to allow for the growth of conditional fees. To the Crusades are we greatly, if not wholly, to attribute their origin: and it were idle to attempt to reconcile the incongruities of writers on these subjects, who seem to have lost sight, not only of history and the manners of the times, but even of the connection which they bear to the general system of feuds.

children,

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children, became at length to be loudly reprobated, and were even tolerated with reluctance. The courts of law set their faces against them: They recurred with triumph to their *fees conditional*: They adverted to the advantages of the one, and to the hardships and inconveniences of the other. Hence they said that such limitations continued fees conditional wherever the statute did not attach; and at last they declared open war against the statute itself. They at first proceeded with caution and address: They sapped the citadel they dared not storm. Countenanced, however, by the wants and wishes of the times, they afterwards attacked, more openly, this bulwark of feudality and aristocratic oppression. The courts from time to time gained a partial conquest; and, at length, even the legislature itself interfered; and "THE STATUTE OF GREAT MEN" has been so far frustrated or repealed, that the entail may be now, by several means, destroyed.

It has already been noticed that the courts of law deemed such limitations to be still fees conditional in those cases where the statute did not apply: Hence came the celebrated question—Whether it extended to copyholds? Many were the champions who on this important occasion entered the lists and threw down the gauntlet of defiance. Many were the prejudices which they had to contend with; and many were the absurdities which they permitted to remain. They said that copyholds, deriving their very existence from custom, without a custom could not be entailed; and, of consequence, they could not be created by a statute which had of course a certain beginning which custom had not in its nature. Others affirmed that, as there were no entails before that statute, there could,
of

of necessity, be none created by a custom which existed before it. And here a person of common penetration would have been apt to conclude that no entail could be of copyholds at all: Since neither the statute without custom, nor custom without the statute, could create one; as from nothing, nothing could be produced. Others, however, more stout, if not more wise, than their fellows, asserted that, although neither the statute or custom alone could effect an entail, that yet they might, by forming a junction, by mutual co-operation, effectuate such estate. But here a more formidable difficulty presented itself; and that was, What is that customary estate on which the statute can attach, and thus be metamorphosed into an estate-tail? An estate, by custom, to a person and the heirs of his body was said to be a fee-conditional as at common law: It was not on this that the statute could operate; as the tenant, on issue had, could still alien in fee. (*Cro. Car.* 42. Rowden and Malster.) To constitute an estate-tail of a copyhold it must be shown that a remainder has been limited over and enjoyed; or that the issue has avoided the alienation of his ancestor, or recovered in a *Formedon in Descender*, &c. (*Co. Litt.* 60. b. 2 *Ves.* 601, &c.)—Now it is laid down as law that, wherever there is a custom to grant a copyhold in fee-simple, there you may limit it to one and the heirs of his body with a remainder over to another in fee; and this by the very custom itself; as a power to limit the largest estate which the law acknowledges, necessarily includes the power of creating a less. (*Cro. Eliz.* 373. Stanton and Barnes. *Poft.* 194. *Lord Raym.* 999.)

If this then be the case, that an estate may be limited to a person and the heirs of his body with a remainder

remainder over, by force of custom alone, what is become of the co-operation of the statute?—Is it not an estate-tail without its help?—And if so, might there not have been an estate-tail before the statute *De donis*?—It is not a fee-conditional, the darling of the common-law, as it has a remainder expectant upon it: For the ultimate disposition could not be good as a conditional limitation (see 1 *Leonard*, 174. *ca.* 244.), as it was too remote.—If it be not a remainder, it cannot be supported; but if it be, then the prior estate must be an estate tail.—If it be not such, what is it? What appellation can be assigned to it?—It is an absolute *non-descript*. It is an estate for which the law has not a name.

Can any grant BY CUSTOM be supported at this day, which could not have been made by custom in times anterior to the statute *De donis*?—If a limitation to a person and the heirs of his body WITH A REMAINDER OVER, be warranted by a custom to grant in fee, where is the distinction between customs to grant in tail, and not to grant in tail, if a custom to grant in fee will include it?

Inconsistency is necessarily the consequence of error; and error here has been the consequence of a want of discrimination and attention to the manners of the times. But it is now, on all hands, agreed that entails may be of copyholds where the usage to entail has been acknowledged; whether it be effected by custom alone, or by the statute alone, or by the operation of both together. And it seems that whether a custom to grant in tail be acknowledged or denied to exist in a particular manor, that all copyholds may be entailed in effect:—if not by custom at law, they may be so in equity without it: For the
custom

custom only binds the tenancy, and has nothing to do with the trust. (See 2. *Ves.* 304. 633. 1. *Strange.* 454. 2 *Bl. Comm.* 367. ch. 22.)—If a surrender be made to a person and his heirs, and a trust be declared of such estate to another and the heirs of his body, a court of equity will see it observed. The trustee and his heirs are tenants to the lord; and the lord has nothing further to do with it. The trust is between the tenant and the *Cestuy que use*, and solely the subject of equity.

Upon the whole, therefore, it should seem that entails were equally before as since the *stat. De donis* (whether known by the name or not);—that the common-law, in favour of alienation, annexed privileges and incidents not originally attached to them: that the statute abolished such privileges and incidents, and restored them to their pristine condition:—That copyholds may, by force of a custom to grant in fee-simple, be limited to a person and the heirs of his body with a remainder over, according to the case of Stanton and Barnes (*Cro. Eliz.* 373. and see *List.* f. 73. 1 *Leon.* 175. *Ca.* 244, &c.); and, consequently, in all manors entails may be allowed where a grant in fee-simple is warranted; and even the question may be avoided by creating a trust. And wherever an entail may be effected, it may be, of consequence, destroyed; as will presently be shown.

NOTE LXXX. p. 175. (I).

WHEREVER entails are permitted of copyholds, such entails may be cut off; as otherwise it would tend to a perpetuity. A recovery is the safer, and Lord Maclesfield said the proper, way of barring such entail (3 *Pr. Wms.* 10.); and such recovery may be suffered without

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without a particular custom to warrant it, according to the case of Dell and Higden, in *Moore*. 358. pl. 488: Though a custom to bar the entail by surrender may be concurrent with a custom to bar by recovery. 2 *Strange*, 1197. and see *post*. 177. N. LXXXI.

NOTE LXXXI. p. 177. (n).

IT is now settled that such custom is good; and that it may be concurrent with a custom to bar by recovery: And if no particular mode be prescribed by the custom of the manor, a surrender, though only to the use of a will, will be sufficient for that purpose, without a special custom to warrant it. See 2 *Ves*. 596. 2 *Strange*, 1197. 2 *Burr*. 979. and Mr. Coxe's note (1) to 3 *Pr. Wms*. 10. and see *post*. 300.

NOTE LXXXII. p. 177. (o).

THESE are the three modes of barring an estate-tail of copyholds: By recovery; by surrender; and by forfeiture and re-grant: though the former seems the most preferable.

And note; as, in the case of an equitable estate-tail in freeholds, a recovery is essential to destroy it (though it was once held otherwise; *Proc. in Chanc*. 228.) See 1 *Bro. Chanc. Cas*. 73. and note (2) to Mr. Coxe's *Pr. Wms*. vol. 1. p. 91.; so in that of an equity in copyholds, the entail must be docked as if it had been a legal entail; and the estate will not pass merely by devise. *Per Loughborough J. C.* See 1 *Bl. Term Rep*. 461. *Roe v. Lowe*. Yet chancery will sometimes relieve though the entail has not been barred, or decree the trustees to surrender. 2 *Vern*. 498. and 585.

NOTE

NOTE LXXXIII. p. 181. (r).

SEE 3 *Lew.* 326 *contra*; and see also *Buller's Nisi Prius*, 161. 1 *Salk.* 185. *Com. Dig.* Copyh. (N). & (R. 12).

And note; that the reason assigned by our author against their taking advantage of the breach of condition does not seem satisfactory; as the case he refers to (see *Cro. Jac.* 305. *Cro. Car.* 24, 5.) was on a transfer of the reversion by surrender and admittance, and, consequently, *with* the consent of the lord: Nor does it appear that the reversion of a copyhold can be otherwise transferred. And it is now settled that a surrenderee of a copyhold is an assignee within this statute. See *Bull. Nisi Pri.* &c. as above, and 3 *Durnf. & East*, 398.

NOTE LXXXIV. p. 184. (y).

WHEN Lord Coke applies the term Freehold to an estate held by copy, he applies it as contradistinguished from a term of years or at will: In every other sense it is inapplicable; and even in this it may not be strictly accurate. When he uses the term with respect "to the state of the law," he opposes it to copyhold: And in this latter sense, he tells us that "he takes it throughout his discourse."

The freehold of lands held by copy or custom is properly in the lord. See *ante*, 156. N. LXVIII.

NOTE LXXXV. p. 195. (z).

IN the case of a surrender to will, the estate remains in the tenant and not in the lord. 4 *Co.* 23. a. and if he makes no will, or, making a will, devises a
portion

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portion only of his estate ; the whole in the one case, or the undisposed-of part in the other, will descend to his customary heirs. *Cro. Eliz.* 148. 442. 4 *Co.* 29. b. 1 *Leon.* 174. *ca.* 244. 2 *Wilf.* 15, 16. and see *post.* 254. N. CXVI. 258.; 337. (b).

So if the intended devisee die in the testator's lifetime it will be a lapsed devise ; or, in other words, the appointment will not take place. 2 *Vesf.* 77.

So if a copyholder, seised in fee, surrender to the use of his will, and afterwards surrender to particular uses with the ultimate limitation to his own right heirs ; he is in of his old use ; and may devise the reversion without any fresh surrender or admission. 2 *J. Blackst. Rep.* 1046.

And note ; if a person surrender to such uses as he *shall* by will appoint, the lands will pass by a will made *previously* to the surrender. 1 *Durnf. & East,* 438. Note.

But a copyhold purchased in the interim between the making of the will and surrender, will not pass. *Ibid.*

And so inseparable is this power of surrendering to the use of a will from the estate of a copyholder, that even a custom against it would not be allowed. See 3 *Bro. Chanc. Cas.* 286.

NOTE LXXXVI. p. 202. (b).

1 *Leon.* 16. *ca.* 19. 3 *Leon.* 59. *ca.* 87. *Dyer* 270. b. *ca.* 23. *acc.* But the case in 1 *Leon.* 16. was only stated by counsel at the bar : That in 3 *Leon.* 59. in C. B. was afterwards adjudged otherwise in the King's-Bench, between the same parties : See 2 *Leon.* 109. *ca.* 142. That in *Dyer* was denied to be law :

See

See 2 *Brownl.* 208. and the case in *Moore*, 812. *pl.* 1098. is *contra*.

It is uniformly admitted that if the admission of the copyholder had been on a *surrender*, and not merely voluntarily, it would not have been chargeable in either case: And it should seem that, even in the instance of a voluntary grant, the estate of the copyholder would be paramount the charge; he being *in* by the custom, and not merely by the act of the lord. See 4 *Co.* 23. b. *Post.* 206, 7.

And when we consider also, that the cases to the contrary have been so frequently oppugned, and even denied, we should, perhaps, be warranted in adhering to the opinion of Lord Coke as stated in the text; namely, that, even in *voluntary* grants, the copyhold shall *not* be charged.

NOTE LXXXVII. p. 209. (s).

To constitute a legal manor there must, of necessity, remain *two* free-tenants at least, subject to escheats:—as a manor cannot exist without a court-baron; nor a court-baron without at least two free-suitors. See *Co. Litt.* 58.—2 *Roll. Abr.* 121. *Manor.* (—) *F. Kitch.* 4. 3 *Durnf. and East*, 447. See 2 *Spir. Laws*, b. 28. c. 27. and 42. *West on Peers*, 13. and 1 *Rob. Cha.* V. f. 1. p. 368, &c. N. (2).

If there be but *one* free-tenant, yet the seignior, as to him, remains with respect to his services, &c. though there can be no court held. 1 *Andersf.* 257. 2 *Lord Raym.* 864.

And if *all* the tenancies escheat, yet it shall so far continue a manor in contemplation of law as to preserve the rights of leets, wrecks, &c. *Calib.* 13.

NOTE LXXXVIII. p. 210. (t).

THESE courts are frequently held together and the proceedings entered on one roll. See *Co. Litt.* 58. a. Yet, though so generally confounded in practice, they are in themselves several and distinct. The court-baron is the court of the free-tenants; the customary, that of the copyholders. The frank-tenants are not the suitors of the customary-court, nor the copyholders of the court-baron. It was the uniform usage of the northern nations to be tried by their peers:—Shall a copyholder then pass judgment on a free-tenant? He is not his peer. On the other hand, a frank-tenant has nothing to do with the copyholder: He notices not his acts. The too common practice, therefore, of confounding the free and copyhold tenants on the homage in court, appears open to much objection. They are not the peers of each other:—The copyholder cannot amerce the free-tenant; nor can the free-tenant present the acts or death of the copyholder. See *Co. Litt.* 58. 126. b. 4 *Co.* 26. 8 *Co.* 39. b. 8cc. 3 *Bl. Comm.* 33. ch. 4. *Magna Charta*, c. 14. *F. N. B.* 75. G. 76. D. and note (a). 2 *Wils.* 20. 4 *Durnf. and East*, 446. and 484. *Post.* 319, 21. 324.

It is not properly a court-baron where only copyholders are present; nor a customary-court where the suitors are only free.—In the court-baron the suitors are judges. Shall we call that a court where there is no one to judge? In manors, therefore, where the courts are blended together, the acts of the several suitors should be carefully stated and preserved distinct.—In the case of *Baldwin v. Tudge*, in 2 *Wils.* 20, it was ruled that debt would not lie for an amercement of a

free-tenant unless it appeared satisfactorily that the persons who affected it were free-tenants also; and see 4 *Durnf. and East*, 484.

NOTE LXXXIX. p. 210. (u).

IN the court-baron the freeholders are judges; and the court should be stated to have been held before *them*. *Co. Litt.* 58. 4 *Durnf. and East*, 446. 484. 2 *Lord Raym.* 862. and see 2 *Spir. Laws*, b. 28. c. 27. and 42.

And the suitors, before whom it is held, should, regularly, be named.—*Moore*, 75. *pl.* 205. 3 *Leon.* 8.

In the customary-court the lord, or his steward, is judge. *Co. Litt.* 58. a, &c. as before.

The title therefore of the court in the entry on the roll should be carefully attended to:—The court-baron should be stated to be held before the suitors; and the customary-court before the lord or his steward. When the courts are held together it would be, perhaps, the safer way not to mention expressly before whom they were held; but to state the persons present generally; and so leave it to the law, which will consider the proper business of each court to have been transacted before the regular judges; (and see 1 *Freem.* 525. *ca.* 707.) Thus:

Manor of }
Fairhurst. }

A Court-Baron and General Customary-Court of the Right Honourable B. Earl of M. Lord of the Manor of F. aforesaid, held in and for the said Manor, on Thursday the ____ day of ____ in the year of our Lord ____

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Present;

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Present:—T. N. Esq. Chief Steward of the
said Manor.

| | | |
|-------|---|-------------------------------|
| A. B. | } | Free-Suitors :—Sworn. |
| C. D. | | |
| E. F. | | |
| &c. | | |
| G. H. | } | Copyhold-Tenants :— Sworn. |
| I. K. | | |
| &c. | | |
| O. P. | | Beadle; &c. |

NOTE XC. p. 212. (*w*).

THAT a manor cannot be created at this day is a position which needs not reference to its support. The creation of manors, in the case of common-persons, seems to have ceased on the passing of the act of *Quia emptores*; and, in the case of tenants *in capite*, by the Stat. 34 Ed. III. c. 15. See *Wright's Ten.* 158. n. (*p*) and see also *Stu. View of Soc. in Eur.* b. 2. c. 3. f. 2. p. 112.

A person, therefore, cannot increase the number of manors:—but, as the freeholders are independent on the copyholders, and the copyholders on the free, the courts, it is said, may be separated:—The seigniorial rights and privileges are, they say, by this not extended or multiplied; they only exist in the hands of two persons separate and distinct.

But it should seem that, if the lord grant the freehold and inheritance of his copyholds in fee, they must be, in consequence, immediately separated from the manor, (though not indeed to the prejudice of the copyholders who are not parties to the grant, see *ante* 209. (*p*),) as such grantee must hold, by the stat. of *Quia emptores terrarum*, of the lord above:—and, consequently,

consequently, that the grantor cannot, on such grant, reserve to himself any services or returns. See *Moore*, 143. *pl.* 285. 4 *Durnf. and East*, 443. See also 2 *Ibid.* 705. *Ante*, 209. (*p*). *Post.* 224. N. XCVIII. 313. (*l*).

And, as a frank-tenancy in fee cannot now be created to be held of the grantor, so neither can a copyhold be granted at this day.—It is essential to the very nature of a copyhold that it has been demised, or at least demisable, “from time whereof the memory of man is not to the contrary.” So that if it can be shown that the premises so granted were, at any time, not demisable, such grant cannot be good. See 2 *Durnf. and East*, 424. *Revell v. Jodrell*; and 705. *Townley v. Gibson*; and 2 *Wilf.* 125. *Roe d. Newman v. Newman*:—In which latter case it was adjudged that a grant of waste-lands by copy, within time of memory, could not be supported;—and see *Lord Hale’s* note (a) to *F. N. B.* 14. D. 1 *Leon.* 55. *Ca.* 70. *Kitch.* 81. b.

But if lands have been granted by copy for a number of years, as 60 or 80, and it can *not* be shown that they were not demisable before that time, the law will presume that they were regularly granted; and consider them as proper copyholds. But in this case, as *Calthorpe* says, it is not the number of years, but the memory of man, on which their nature as copyhold depends. Such a number of years will create a presumption: but if it can be shown that they were once not demisable, then such presumption must give place to proof. See *Caltb. Readings*, 19. 54, 55.

NOTE XCI. p. 212. (*).

SEE *Bull. N. P.* 107. 1 *Durnf. and East*, 600.
 2 *Espin. N. P.* 145—7. 3 *Durnf. and East*, 169.
 1 *Leon.* 100. ca. 128. *Com. Dig. Copyh.* (K. 3).
Post. 285. (p).

It appears by the laws of *Hoel Dda* that among the British a proprietor of lands could have let them for a year at his pleasure, though he could not alien or charge them;—and see 1 *Whit. Manch.* c. 8. s. 4. p. 377.

NOTE XCII. p. 213. (y).

Co. Copyb. s. 51. *Cro. Eliz.* 462. 676. 2 *Espin. N. P.* 145.

Though a lease for several years without a licence or special custom is clearly a cause of forfeiture, yet the estate of the copyholder continues till the lord actually enters, or otherwise takes advantage of it as such.—It is not a forfeiture *ipso facto*;—it is not an absolute and immediate destruction of the tenant's interest:—It is only an act for which the lord *may* enter if he pleases; but if he does not choose to take advantage of it, the tenant's estate remains as before. The lord may waive the forfeiture; or if he die without entering, his heir shall not enter; nor is the lessee a disseisor. See 1 *Salk.* 186, 7. *Cro. Jac.* 301. 3 *Durnf. and East*, 171, 3. *Lex. Cust.* 226. ch. 22. *Post.* 247. 309. (*).

The lease therefore may well be considered as good as to every one but the lord.

But the great objection to an ejectment being maintainable on such lease is, that, as the plaintiff in that
 action

action must recover by the strength of his own title, and not by the weakness of his adversary's (4 *Burr.* 2487.), he must show a title in himself. Now, should he declare that the premises are copyhold, and that the copyholder made a lease for several years to him, it would be necessary, it is asserted, either to show a licence, or to allege a custom, to warrant such lease; else it would be insupportable from his own statement. (See *Cro. Eliz.* 469. *Moore*, 679. *ca.* 927.) But yet it is elsewhere said (2 *Brownl.* 40.), that the licence need not be mentioned in the declaration; but that the plaintiff ought to give it in evidence on not-guilty pleaded: But if the defendant plead specially, then the plaintiff must plead the licence certainly, in his replication. Again it has been adjudged in other cases (see 1 *Leon.* 100. *ca.* 128.) that the plaintiff need not show that the lease is warranted by the custom; but that that shall come from the other side.

What opinion shall we adopt among such a contrariety of sentiment? What conclusion shall we deduce from *data* so vague? What is to be done when no custom or licence is alleged? Shall the court consider the lease as a common-law lease, and say it is bad upon the plaintiff's own showing? (*Cro. Eliz.* 469.) Or shall it not rather say "We sit not to try the lord's title, but to administer justice between individuals who have not his claim: And, even if execution be had on our decision, there can be no disfeisin effected as to any. (See 1 *Burr.* 113.) The lord will not be injured: He is not concluded by a judgment on a suit to which he is not a party: He may yet seize, if he pleases, for a forfeiture." "But to what end," it may be urged, "will you award possession of a term which the lord may defeat the

next hour by his entry?" To this it may be replied: "We know not when the lord may enter, or whether he will enter at all. He may waive the forfeiture, and affirm the lease. But, be this as it may, that is his business; ours is to decide on the case now legally before us. He may, it is true, enter and defeat it; and he may also make it good, even as to himself: in that case, our award would not be nugatory. (See *Lex Cust.* 212.) We await not his affirmance: The term, as between the parties, has as yet an existence: and it is *their* cause, and not *his*, that we are now to decide."—It should seem, therefore, that such ejectment *is* maintainable.

NOTE XCIII. p. 216. (*f*).

SEE 9 *Co.* 75. Combe's case. 2 *Ves.* 679. Mitchell *v.* Neale; and *post.* 251, 2.

But a person is not compellable to surrender by attorney; and therefore, on a covenant to surrender on request, the refusing to execute a letter of attorney to make a surrender is no breach. *Cro. Car.* 299.

So a purchaser is not obliged to accept a surrender by attorney where the necessity does not appear. See 2 *Ves.* 679.

And it was said in a note by the reporter of the latter case, that, if a person be legally constituted an attorney, he may act as such notwithstanding his principal be present in court.

NOTE XCIV. p. 218. (*i*).

IT is an established principle that, as to every one but the lord, the admittance shall relate to the surrender, and operate as from its date. The surrender

der is the substantial part of the conveyance; the admission is now merely a form. The surrenderee is *in* by him who made the surrender, and not by the lord. *Co. Copyb.* f. 41. 3 *Burr.* 1543. 4 *Ibid.* 1961, 2. 5 *Ibid.* 2786. *Post.* 218. 257. 288.

Hence, on admission, the mesne acts of the surrenderor are defeated.—See *Cartb.* 275, 6.

So the mesne acts of the surrenderee are effectuated and confirmed. And, therefore, in ejectment he may lay his demise between the surrender and admittance, (see 1 *Durnf. and East*, 600.); and shall, on admission, recover the mesne profits. (See 2 *Wilf.* 15.)

So the incidents or customary privileges, or estates, derivable out of that of the surrenderor are defeated, and attach to that of the surrenderee.—If a copyholder therefore surrender to the use of another and die, and the surrenderee be afterwards admitted, the widow of the surrenderor shall not have her free-bench. See the case of Benson and Scott, *Cartbew* 275. 1 *Salk.* 185. 1 *Lev.* 385. and see *post.* 311. N. CLXIV.

But if the surrenderee die before admittance, *his* widow shall be endowed, and his heir in by descent. See 5 *Burr.* 2764. *Vaughan d. Atkins v. Atkins.*

See further, 3 *Burr.* 1543. 4 *Burr.* 1952. *ante* 163. N. LXXV.; and *post.* 275. (p). 289.

NOTE XCIV.* p. 220. (r).

BUT the lord cannot make a grant of a copyhold to *his own wife*: A man and his wife being but one person in law, he cannot convey to her but through the intervention of another. See 2 *Wilf.* 254.

NOTE

NOTE XCV. p. 220. (s).

By the *general custom*, the presentment should be at the *next* court: To make the presentment at any other or subsequent court, it seems that a *special custom* should be shown. See 2 *Ves.* 302. 602.; and see further on this head, *Com. Dig. Copyh.* (F. 11.) *Viner*, *Copyh.* (U. a) and (X. a); and *post.* 278, &c.

But the want of a proper presentment will, under certain circumstances, be aided in equity: Of which see 2 *Salk.* 449. *Taylor v. Wheeler.* *Viner*, *Copyh.* (Y. a); and *Com. Dig. ubi supra.*

NOTE XCVI. p. 223. (e).

THE reason of this is that the copyhold passed as part of the manor: The naming it was merely surplusage. And the granting the inheritance of the copyhold by the lord shall not operate to the copyholder's prejudice. See *Cro. Car.* 521. and *ante* 209. (p).

But this lease is supposed to be made to a stranger; for if the copyholder himself take a lease of the manor, it would extinguish his copyhold. See *Cro. Eliz.* 8. *ca.* 1. 4 *Co.* 31. b. *Moore*, 185. *pl.* 330. and *infra.*

So if the lease to the stranger be assigned to the copyholder. See 2 *Co.* 16. *Lane's case.*

For in these cases the extinguishment is the consequence of his own act.

NOTE XCVII. p. 224. (b).

It should seem that no admittance is necessary in the case of a widow on the death of the husband, and, of consequence, that no fine can be due; unless there be a custom to warrant such admission: and, perhaps, even such a custom would not be allowed; the estate of the widow being considered as a continuance of that
of

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of the husband rather than as a devolution in nature of a descent. In many manors, fines on marriage remained long payable; and, consequently, it was unreasonable to demand another fine on the entry of the widow, as she was by marriage in such cases initiated into the tenancy. See *ante* 12. N. XII. 108. (i) and (k). *Post.* 289. N. CXXXVI. *Hutton*, 16, 17. *Hob.* 181. 1 *Levinz*, 21. and 172, 3. *Kitch.* 123. 2. *Wask. on Desc.* ch. 1. s. 2. p. 53, 4. and notes, 1 *Burr.* 209. 214. *Fisher on Copyh.* ch. 10. p. 87.

NOTE XCVIII. p. 224. (i).

SEE 1 *Salk.* 170. *Crowder v. Oldfield*, and *quere* of that case as there reported; as the copyholder on enfranchisement had ceased to be a customary tenant, for he must afterwards have held of the lord above. (See *ante* 212. N. XC.) and see it differently reported in 2 *Lord Raym.* 1225, and also in *Salk.* 364.

If common, by enfranchisement, be extinct at law, equity will, under certain circumstances, decree its continuance. See the case of *Styant v. Staker*, 2 *Vern.* 250. and further *Com. Dig.* Copyh. (K. 6); *Viner*, Copyh. (K. e); and *post.* 310.

NOTE XCIX. p. 226. (m).

THE truth is, that all forfeitures are odious in the eye of the law, and therefore it always leans against them. In this case, the copyholder does not deny the right of the lord to the rent; he does not disavow his dependency; he only solicits an indulgence:—If the lord does not choose to accede to it, he may distrain.

This

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This therefore cannot amount to a forfeiture. See 1 *Roll. Abr. Copyb.* (C) pl. 4. *Moore*, 350. pl. 468. and 623. pl. 851. *Cro. Eliz.* 505.

NOTE C. p. 230. (g).

BUT without such special custom the lord can only seize *quousque*. See 1 *Levintz*, 63. 1 *Leon.* 100. ca. 128. 3 *Durnf. & East*, 162. and see *Cartshew*, 41—5. and *Viner*, *Copyh.* (N. c); see also *post.* 286 & 287. (c).

By the feudal law, when the feud became hereditary, proclamation was made for the heir to make his claim: If he neglected to appear on the third summons, the lord was put into possession till he did appear: If he appeared within the year, the possession was restored to him; but if he did not, the feud was absolutely lost; and see *Wright's Ten.* 196—8. *Dalrymple*, *F. P.* ch. 3. s. 2. p. 47. &c. *Kaims's Treatises*, Tr. V. 2 *Bl. Comm.* ch. 18. p. 278. and *ante* 24. N. XXII.

NOTE CI. p. 231. (t).

SEE 8 *Co.* 101. a. *Cro. Jac.* 101.

Although the heir is not obliged to come in and be admitted till his ancestor's death has been formally presented and proclamation regularly made, (of which see 3 *Durnf. & East*, 164. notes,) though he be within the realm, 1 *Leon.* 104. ca. 128. 3 *Leon.* 221. ca. 294. 4 *Leon.* 31. ca. 84. *post.* 286. yet it should seem that he shall be bound, on presentment and proclamations made, if he leave the kingdom after the descent, and before the first proclamation; for the point on which these cases turn is, whether,
by

by intendment of law, the heir could have had notice of the descent and his obligation to be admitted, or not?—And it seems that the law will intend that he had knowledge, if he be within the realm at the time of his ancestor's decease: But if it should be apparent that the heir could not have been informed of such event before his departure, the court would relieve; as in such case the presumption or intendment of law would be rebutted. And it should seem that the court would be satisfied, even with slight grounds, in order to rebut such presumption; as forfeitures are not to be favoured; and the inclination would be rather for the benefit of the heir at law.

NOTE CII. p. 235. (b).

It is clear that the recovery by the tenant for life will not affect the remainders over; but it may be a forfeiture of the life estate by special custom, of which the lord shall take advantage and not the remainderman. (See *ante* 173. (b).) But it is said to be no forfeiture even of the life-estate, without such special custom; the lord himself being a party to it.

See 1 *Freem.* 192. *pl.* 196. *Viner*, Copyh. (I. c), *pl.* 9. in marg. and *Fisher on Copyholds*, 96.

NOTE CIII. p. 239. (i).

It is now settled, that, in cases where the lord is compellable to admit, and the heirs of the person admitted are also subject to fines on the devolution of the estate, a fine must not exceed *two* years improved value of the lands, without deducting land-tax, &c. except quit-rents: (See *Dougl.* 724. and notes.)

NOTE

NOTE CIV. p. 239. (k).

BUT where the admission is not compulsory, as in voluntary grants; or in cases of copyholds for lives, where there is no right of renewal; or where, in cases of inheritance, the fine is only payable on the admission of the *purchaser*, whose heirs are *not* fineable; an arbitrary fine *will* not be restricted, but *may* exceed the two years value. See 1 *Freem.* 496. *pl.* 670. 13 *Co.* 3. 1 *Abr. Cas. in Eq.* 120. Copyh. (A), *pl.* 15. in marg. (Case of Lord Abergavenny v. Thomas.)

NOTE CV. p. 241. (o).

BUT not without a special custom. 1 *Lev.* 263. 2 *Vent.* 38. 2 *Hawk. P. C.* ch. 49. f. 7.

If a forfeiture be presented and the lord seize; yet, on the acquittal of the tenant, the forfeiture shall be discharged, *Godb.* 267. *ca.* 370.; and so, if, after conviction, he has his clergy. 1 *Lev.* 263. and next page.

See further of forfeiture for crimes, 2 *Hawk. P. C.* ch. 49. f. 7. *Com. Dig.* Copyh. (M. 1.) *Viner*, Copyh. (M. o.) *Fish. on Copyh.* 102.

NOTE CVI. p. 242. (q).

A SURRENDERER, or devisee (who is properly no other) of a copyhold, who commits a felony and is attainted before admission, shall not forfeit his copyhold. 2 *Wilf.* 13.

But this differs from Packington's case: *There* the offender had a legal reversion, which is a *tenement*,
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(see *Dyer*, 137. b. *pl.* 26.): But *here* the person attainted had only an equitable interest, (see *ante* 163. N. LXXV.) on which the custom could not attach.

NOTE CVII. p. 246. (a).

See *Co. Copyb.* f. 59. *Traffs*, 138. *contra*. See also *Lord Raym.* 999.

We may here observe that, generally speaking, the acts of one copyholder cannot prejudice the estate of another; and therefore the forfeiture of a tenant for life will not destroy the remainders over. *Cro. Eliz.* 879. *Post.* 250. 305. N. CLVII. See 2 *P. Wms.* 10. note (F).

As to those cases indeed, where, on grants to several for lives *successive*, the first tenant may dispose of the whole estate; it seems to hold only where the first tenant has the beneficial interest in the whole; as it would be manifestly unjust that one person should injure or defeat the property of another; and a custom to enable any one to do so would certainly be insupportable. See 2 *Lord Raym.* 999. *Fish. on Copyb.* 15. and *post.* 305. N. CLVII.

So the acts of the copyholder alone shall not prejudice the lord. See 1 *Salk.* 189.

Nor can those of the lord only prejudice his tenant. 2 *Co.* 17. a. &c.

NOTE CVIII. p. 249. (f).

In 1 *Brownl.* 149, 150. the case is so stated by *Yelverton*; but the reporter says that *Walter* seemed of another opinion, and therefore adds a *quere*, as our author has done.

Indeed

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Indeed the doctrine seems justly questionable. The person wrongfully admitted was tenant to the lord; if he then commit a forfeiture, shall the release of the person having right operate to the lord's prejudice? The release is confined to the releasor and releasee; shall the lord then be precluded from exerting his rights by the private agreement of these individuals?

NOTE CIX. p. 250. (b).

FOR the destruction of the estate is thus in consequence of the tenant's own act: And whenever the estate of the tenant is so determined, he is not entitled to his emblements; he can only claim them when his estate is determined by the act of another person, or by the act of God; and this by reason of the uncertainty as to himself: But where the expiration of his estate is certain and known to him, or where he destroys it himself, he shall not have them. In the first case, it was his own folly to sow the lands which he knew he was not to reap; and, in the latter, he must take the consequences of his own conduct.

NOTE CX. p. 250. (i).

"So if it were leased." Here seems a dislocation of the text. The passage should, I conceive, have terminated here. The lease alluded to is a lease of the *manor*, and not of the *copyhold*: For the lessee of the copyholder would have been entitled to the emblements. The law, indeed, is otherwise laid down by Lord Coke in Oland's case (5 Co. 116. a.); but that case is differently given by Rolle (1 Abr. Emblemen. (A), 727. pl. 10.), and Croke (Eliz. 460.); for we are there told, that it was
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agreed that the *lessee* should have the emblements, "as the act of the tenant should not prejudice a third person :". And see 5 Co. 85. a. Sir H. Knivett's case; and 2 Bl. Comm. 123, 4.

If, indeed, the lease was itself the cause of forfeiture, and the lord enter, it might be otherwise; as the lessee himself might then be regarded as a *particeps criminis*.

NOTE CXI. p. 250. (m).

WHEREVER the lord has power to hold a court, the steward has power to do so likewise. It should be held *within* the manor, as it may well be doubted whether the lord can compel the attendance of his tenants out of it. It may in some cases, it is affirmed, be good by custom if held elsewhere; as if a general court be kept for an honour, which includes several manors. (See Co. Litt. 58. a. Cro. Car. 367.) And, indeed, it is said that a *customary court* (for it is acknowledged that it is otherwise as to a court-baron, Co. Litt. 58. a.) may be held as well without the manor as within, though there be no custom to warrant it. See 1 Leon. 288. ca. 394. Cro. Eliz. 103. Post. 319. But this must be when the tenants voluntarily attend, for it does not appear that they are anywise compellable to go out of the manor; as otherwise it would be in the power of a lord to make his copyholders travel from Cornwall to Cumberland as often as he should be pleased to hold a court.

The lord may admit or grant *out of court* (4 Co. 26. b. Post. 319.); and the steward may admit (see Kitch. 82. b. 1 Roll. Abr. 505. Copyh. (V), pl. 4. and see post. 251. N. CXII.); and, it should seem,

may grant (see *Bro. Court-Bar*, pl. 22. and *Ten. p. Copie*, pl. 26. *Cro. Eliz.* 103.) out of court also. But it is said that an under steward must have either a special authority or custom to enable him even to admit. (See *Bro. ubi sup.* and *Co. Copyh.* f. 46.) *Sed quare*; for may not a deputy-steward, properly appointed, do whatever his principal might? (See *Lord Raym.* 659. and 1 *Salk.* 95.)

Now wherever a grant or admittance would be good *out of court*, it should seem that it would be good also if *out of the manor*; whether made by the lord or his steward (see 1 *Lord Raym.* 76. *contra*), or a deputy-steward (see 1 *Salk.* 184.); for, of consequence, the presence of the tenants is not necessary.

But the presence of the tenants is absolutely essential to the very existence of A COURT; there cannot be A COURT held without them: But their presence is not indispensably requisite to the admission of a new copyholder, as it anciently was to that of a frank-tenant. (See *ante*, 39. N. XXIX.) Each frank-tenant, as *West* (p. 63.) remarks, had originally a negative on every person who was proposed by the lord to be admitted. But this did not hold as to copyhold tenants. The copyholder, if not properly a villein, was removed but little from that order of men, and was, at least, but a tenant strictly at will: He was not to be judged by his fellow-tenants, as the freeholder was; the lord, or his steward, was the judge of his court; or if he was amenable to a superior one, he was to be tried by freemen, as copyholders could not form a jury at common law. The presentment of his fellows was not essential to give power to the lord to resume his tenement (see *post.* 278.); he might

might have seized it at his pleasure whenever he chose to permit him no longer to hold. From hence then must it appear that the same reasons did not apply to the copyhold tenant as did to the free, with respect to the admission of a new person into the tenancy. Hence the lord, or his steward, may admit as well out of court as in; since the approbation, or even the testimony, of the former tenants is not requisite. It were, indeed, most egregiously absurd to suppose the concurrence of others to be necessary, where the estates, equally of themselves as of the person about to be admitted, were absolutely dependant upon the will of the lord, not only as to their origin, but also as to their duration and extent.

The admission, however, of the new tenant out of court should regularly be notified by the lord or his steward, at the next court-day, for the information of the tenants. This too was more immediately necessary in ancient days; as, in case the tenants should have known any objections to the person so admitted, of which the lord might have been ignorant, they might have informed him of them; from which he might have been induced to resume the estate, as having conferred it on a person who was unworthy of the grant. Add to this, that it must be regularly inserted on the court-rolls of the manor; by a copy of which he is to hold.

NOTE CXII. p. 251. (r).

A STEWARD may take a surrender out of court, and even out of the manor, without a special custom or authority to do so. 1 *Salk.* 184. *Co. Litt.* 59. a. n. (6).

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And indeed a custom to the contrary would be void. See 1 *Lord Raym.* 76.

NOTE CXIII. p. 252. (t).

WHEN a stranger *passes* or *conveys* the interest of another, it is necessary that his power so to do should be satisfactorily proved; but when he *takes* merely for his benefit, the estate will vest in him, without an *express* consent. See *post.* 285. and *ante*, 216. N. XCIII.

NOTE CXIV. p. 252. (u).

So the steward or his deputy may take such surrender; or either of them may depute or substitute another to take it. See 1 *Salk.* 95. 1 *Lord Raym.* 658. *Com. Rep.* 84.

NOTE CXV. p. 252. (x).

SEE *post.* 273, 4. The same words spoken out of court will amount to a surrender as if spoken in court, if spoken before a person authorized to take a surrender out of court (see page 253.): But words spoken out of court before indifferent persons, or in common conversation, or in anger, &c. cannot possibly amount to a surrender of a copyhold.

NOTE CXVI. p. 254. (y).

By a surrender of a tenant in fee no more of his estate passes than will satisfy the uses declared: The residue will continue in him as of his old estate. See 9 *Co.* 107. a. 1 *Brownl.* 181. *Cro. Eliz.* 442. 4 *Co.* 29. b. See also *ante*, 195. N. LXXXV.

NOTE

NOTE CXVII. p. 254. (a).

BUT *Comyns* concludes from 1 *Roll. [Rep.]* 253. that the lord shall have it to the use of the surrenderor. See his *Dig. Copyh. (F.8)*. *Sed quare*: and see 1 *Pr. Wms.* 17. where *Holt, C. J.* said, "If a copyholder surrenders to the lord without declaring an use, the copyhold extinguishes, as on a surrender by tenant for life to him in reversion."

NOTE CXVIII. p. 255. (c).

Godb. 269. ca. 374. *Supplem. to Co. Copyb. f. 10. Traſts*, 175. acc. though there are cases to the contrary: yet doubtless the legal estate did not pass from the copyholder; and, therefore, it may well be questioned whether the law is not as conceived by our Author in his text; and more especially as forfeitures are by no means to be favoured; and see *ante*, 235. (a); and *post.* 338. N. CLXXIX.

NOTE CXIX. p. 255. (e).

FOR he was admitted as tenant for *his own life*; and was IN BY THE LORD, and not by *the surrenderor*. See the case cited, *Cro. Car.* 205.

The admission of the new tenant for *his life*, on the surrender of the old one, was the lord's own act. He could not have been compelled to admit him on such terms. The old tenant had an estate for *his own life*, and not for the life of another: He could have transferred *that* interest, but he could not oblige the lord to grant an interest, which might have been of longer continuance. If a tenant for life, of freehold lands,

conveys to another for the life of the grantee, it is a forfeiture of his estate. The surrender, indeed, is not, in this case, a forfeiture, as it only passed the interest of the surrenderee; but he could only nominate a tenant as to that interest. Could a copyholder for life surrender to another for his life, and the lord be compellable to admit, such estate might be protracted for ever: as the tenant, who was withering with age or consuming with sickness, might so introduce into the tenancy a person who might possibly continue in it for a century to come. See *post*. 256, 7. 261, 2. *Co. Litt.* 58. b. n. (5); and 59. b. n. (2).

And, accordingly, we find it declared that a custom for a tenant for life to surrender to another for the life of that other, would not be good. *Moore*, 8. *ca.* 27. and next page.

NOTE CXX. p. 257. (i).

SEE *ante*, 255. N. CXIX. When a copyholder surrenders his interest, or a portion of his interest, to the use of another, whom he nominates to succeed him in the tenancy, the person so nominated shall, when admitted, be *in* by the surrenderee. (See *ante*, 218. N. XCIV.) This is merely a transfer of the existing interest by one individual to another, and the lord is only an instrument of conveyance. But on voluntary grants the new tenant must be *in* by the lord. He derives no interest from his predecessor. He cannot therefore be *in* by him. In the case stated, where a copyholder for life surrenders to another for *his* life, and the lord admits, the new tenant must be *in* by the lord. He does not succeed to the interest of the former tenant; for that was only to continue during such tenant's life; The estate to which he is admitted

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is for his own life; which estate was never, in the old tenant, but is a new grant from the lord. The old tenant could not transfer what he had not himself. The new one, therefore, being in of a different estate, cannot be in by him, but by the lord who granted it.

If a tenant for life or in tail surrender to a disseisor of a manor to the use of another for life or in tail, and the disseisor admit the surrenderee, it shall not bind the disseisee: But if *A.*, a tenant for life, surrender to such disseisor to the use of another during the life of *A.*, and the disseisor admit him accordingly, it shall bind the disseisee for ever. See 1 *Roll. Abr.* 503. Copyh. (P), *pl.* 4. and 5 *Co. Litt.* 58. b. n. (5).

The reason of this is, that, in the first instances, the admittance would have operated as a new grant; for the person admitted would have had an estate which was not in the surrenderee, and consequently could have been derived only from the lord. In the latter, it was merely a transfer of the old tenant's interest; where the disseisor was no more than an instrument: And where the disseisor is only an instrument of conveyance, his acts will bind the disseisee: But in the case of voluntary grants they will not do so. See *ante*, 198.

NOTE CXXI. p. 259. (n).

It was observed by *Holt*, C. J. (1 *Pr. Wms.* 17.) that "the resolution in 2 *Roll. Abr.* 67. (Grants, *pl.* 18.) was founded upon the custom of the manor, which was that a person named after the *Habendum* should take the estate limited to him." And in *Cro. Jac.* 434. we find it alleged, as one ground of the judg-

ment, that "in many manors there were no other forms of grant or limitation."

In *Rolle* too, a distinction is taken between such a limitation on an admission in consequence of a surrender, and on a voluntary grant:—In the one instance it is said to enure by way of explanation of the surrender; and in such case the form of the grant is not material: But that in the other the estate passes solely by the grant, and there is no surrender to direct it, or to guide the construction. See *pl.* 18, 19. and 23.

NOTE CXXII. p. 263. (u).

THE freehold of lands held by copy is in the lord, and therefore *quare* whether the rule, that a contingent remainder must vest during the continuance of the particular estate, or *eo instanti* that it determines, extends to copyholds. See 3 *Atk.* 13. and see also 1 *Atk.* 590. *Cases Temp. Talb.* 151. 1 *Fearne*, 427—449. and *ante*, 98. (y); and *post.* 303. (m).

NOTE CXXIII. p. 266. (y).

SEE *ante*, 173. (b). And note the difference between a *Civil* and a *Natural* death. See 2 *Co.* 48. b. *Co. Litt.* 132. a. 2 *Bl. Comm.* 121. and 4 *Ibid.* 380, 1. and 3 *Lev.* 94.

As, for instance, if a copyhold be granted to *A.* for life, with remainder to *B.* in fee, and *A.* commit waste; the lord may enter, and retain the lands till *A.*'s natural death. But if *A.*, instead of committing waste, be supposed to be outlawed for a capital crime, he would be dead in law; and, consequently, *B.*'s estate would, it should seem, come into possession, in case *A.*'s estate was not expressly limited to him for his natural life. See the books as cited above.

NOTE

NOTE CXXIV. p. 271. (f).

THE case alluded to (*Pawsey v. Lowdell*) differs from Archer's case in this:—In the case of Archer, the limitation was “to the heirs male of the body of such heir male;” so that the inheritance was by express words, as our Author says, given *to the issue*; and such issue was made the root of a new inheritance; the stock of a new descent. See *Harg. Law Tracts*, 506. &c. 1 *Fearne*, 229. *Watk. on Des.* ch. 5. p. 170.

In that of *Pawsey v. Lowdell*, it was to *B.* for life, and, after his death, to the heir of his body begotten, for ever; where the word “heir” was deemed *nomen collectivum*; and, consequently, according to the rule in *Shelly's* case, the limitation vested in the ancestor, and the heir was in by descent. The heirs were confined, by the first part of the limitation, to those of the body; but then the words “for ever” were added: But those words do not seem (as noticed above, 270. (e),) to have the consequence our Author so repeatedly insists on.

NOTE CXXV. p. 272. (g).

THE particular estate being confined to the wife, and the limitation over being to the heirs of the bodies of both husband *and* wife, the estate-tail was not executed; but the heirs of the bodies of husband and wife took by purchase. See *ante*, 269. (b); and see the case of *Frogmorton d. Robinson v. Wharrey*, 2 *Bl. Rep.* 728. and 3 *Wils.* 125. and 144. 1 *Fearne*, 43, &c. and *Co. Litt.* 26. a. n. (3); and 219. a. n. (3).

NOTE

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NOTE CXXVI. p. 272. (b).

If the husband dies first, the fee will undoubtedly descend to his eldest son;—But then, on the death of the wife, such son would be the heir of *both* their bodies; and would, consequently, take the remainder in tail:—and such estate-tail would not be merged in the fee. (*Plowd.* 296. b.) If the wife, indeed, dies first, the remainder would be destroyed; as there could be no heir of *both* their bodies till the death of both; and, consequently, no one to take the remainder when it ought to vest.

NOTE CXXVII. p. 272. (i).

THE distinction taken by Coke was when the surrenderee took a particular estate himself, and when not (and see *Kitch.* 86. a. 88. a. and b.): And such distinction has been recognized in the case of *Roe v. Quartley* (1 *Durnf. and East*, 634.): Yet it is questioned by our Author; and also by Mr. *Fearne* (*Conting. Rem.* 86. 4th ed.).

Indeed a similar distinction was once, it seems, held as to freeholds (see *Dyer*, 134. a. pl. 7. &c. and *Hob.* 31.); but has been now long exploded (see 3 *Lev.* 406. *Salk.* 591. 2 *Pr. Wms.* 138.—in which latter book, the case in *Hobart* was denied to be law): And, as it is now settled that the surrenderor of a copyhold taking the ultimate limitation is in of his *old* estate (see 4 *Burr.* 1952. 1 *Str.* 487. 2 *Bl. Rep.* 1046. 1 *Fearne*, 86. &c.); it should seem also that the case of *Allen and Palmer*, which our Author cites, is (notwithstanding its recognition in that of *Roe and Quartley*) not now law.

NOTE

NOTE CXXVIII. p. 277. (w).

WITH the consent of her husband ; but not without. 2 *Wils.* 1. See *post.* 322. N. CLXVI.

For as the husband becomes, on marriage, seised in her right, it should seem therefore unreasonable to suffer the wife to deprive him of his interest without his consent; and see *ante*, 256.

But if she surrenders, in his presence, it seems to be sufficient, though he does not join ; his consent being, in such case, apparent. See 1 *Ves.* 229.

So it should seem that where a wife has a copyhold to her separate use, she may surrender it without the concurrence of her husband : For here the reason fails. *Sed quære* ; and see 2 *Brow, Chanc. Cas.* 377 ; and see also 3 *Ibid.* 8. and 1 *Ves.* 303. 518.

NOTE CXXIX. p. 281. (d).

So if the lord wrongfully seize the copyhold of his tenant, and grant it to a stranger in fee, and the grantee die seised ; yet the first copyholder, or his heir, may enter upon the heir of the wrongful tenant, and surrender to the use of a stranger. See *Cro. Jac.* 36. *pl.* 10.

So if an infant surrenders, and the surrenderee be admitted, yet the infant, when of full age, may enter upon him. *Moore*, 597. *pl.* 814 ; and see 1 *Leon.* 95. *ca.* 124.

NOTE CXXX. p. 283. (g).

SEE *ante*, 163. N. LXXV. 275. 281, 2. *Co. Litt.* 60. a. n. (2). *Co. Copyh.* f. 39. 1 *Brownl.* 143. and

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and *quare* as to this ; for the books are contradictory. But it should seem from the principle of the thing, that the admission of the first surrenderee *would* be implied. The first surrenderee, indeed, having no legal interest in the premises, could not compel the lord to accept a surrender from him, without a previous admission : Yet if he chose to accept it, why may he not do so ? Neither party is injured : The forms are satisfied, or waived by him who only is interested. And on the second surrenderee being admitted, the law, it should seem, would not suffer the right of the first surrenderee to be questioned, and the whole title unravelled.

NOTE CXXXI. p. 285. (o).

THE interest of I. S. was assignable. See *ante*, 163. N. LXXV. and 2 *Durnf. and East*, 484.

So, I. S. might have *released* to I. N. on his admittance. See *ante*, 157. N. LXIX. 192, 3.

Yet *quare*, as our Author says, whether such assignment or release would be good by *parol*. For though the stat. 29 *Car. 2. c. 3.* does not extend, by express exception, to copyhold or customary interests, yet would a *right*, or interest of this kind, pass at common-law without *deed*?

NOTE CXXXII. p. 286. (q).

SEE *ante* 162. N. LXXIV. And *quare*, as the heir was not necessitated to claim admittance till proclamation made (*infra*). If he does not come in on the customary proclamations, the lord may seize :—If the lord does not seize, it is his own fault ; and the estate of the heir cannot, I think, be considered as *devested* by reason of circumstances like these.

NOTE CXXXIII. p. 287. (t).

BUT if a person surrender out of court for a *valuable* consideration, he cannot revoke it, though before presentment. See *Co. Copyb.* f. 39. *Traffs*, 88. *Kitch.* 82.

NOTE CXXXIV. p. 287. (u).

Kitchin says that it may be revoked at any time before admission; and adds, "*Et c. plus tost est usé, et estoit ove reason: Et issint est le ley come semblo a moy.*"—82. a.

NOTE CXXXV. p. 287. (w).

THIS can only be where the delay of admission is occasioned by the heir; as if the lord make proclamation for him to come in and be admitted, and the heir does not do so before the third proclamation be made: Here the law perhaps would permit the lord to avow on him by reason of the length of time now usual between the death of the ancestor and the third proclamation, as courts at this day are so seldom held; and the lord manifests his intention to admit him when he shall come and request it. But if the delay be occasioned by the lord himself, the avowing on the heir for rents or services would, I conceive, be tantamount to an admission in itself; as it would certainly be acknowledging him as tenant. In the former case, the law would not perhaps suffer the heir to avail himself of the avowal as an admittance; when it was the effect of his own neglect or refusal: Yet, even in that case, there would be field for doubt, as the lord might have held his court oftener if he pleased. See *Co. Copyb.* f. 31. *Traffs*, 50; and *ante*, 282. (f).

NOTE

NOTE CXXXVI. p. 289. (*f*).

SEE *post*. 291. N. CXXXIX. and 333. *Dyer*, 251. *pl.* 90. *Co. Copyb.* f. 56. *Traffs*, 129. *acc.*

The approbation of the lord was originally necessary to enable the feme to marry; whence a fine was generally paid on that event. (See *Co. Litt.* 117. b. 139. b. 140. a. *Sulliv.* lect. xxiv. p. 227.) Such approbation was equivalent to an admission of the husband into the tenancy. See *ante*, 12. N. XII. 108. (*i* and *k*); 224. N. XCVII. The husband from thence became seised or possessed in right of marriage, and was to do the services to the lord. (See *Calth.* 52. *Gro. Eliz.* 149. *pl.* 18i) From these principles it should seem to follow that when once a person became fixed in the tenancy by marriage, no admission could be afterwards necessary. See *ante*, 224. N. XCVII.

NOTE CXXXVII. p. 290. (*b*).

It is now settled that executors must be admitted and pay their fine. See 1 *Burr.* 206. *Earl of Bath v. Abney*.

NOTE CXXXVIII. p. 290. (*i*).

SEE *Com. Rep.* 245. and 2 *Wilf.* 14. And *quere* of the assertion there noticed, as the lord might have been compelled to admit by *mandamus*. See *ante*, 157. N. LXXII.

But it is said that if the lord accept a surrender, and the surrenderee enter in consequence, and afterwards the lord oust him before admittance, an action would lie against the lord; because he shall not take
advantage

advantage of his own wrong. 2 *Wils.* 15. There does not, as this case is put, appear any title in the lord to enter; his tenancy is full; the surrenderor continues tenant to him. The surrenderee entered with the consent of the surrenderor, he is not therefore a trespasser as to him; he must be considered at least as his tenant at will, and therefore no disseisor of the lord. The lord is not injured by his occupancy; he is compellable to admit him; and in the mean time the surrenderor is answerable for the fruits of the tenancy. The lord can have no more right to enter and oust the tenant at will of his copyholder, than to expulse the copyholder himself: If he does so, he would, I conceive, in either case, be subject to an action as here stated. See *ante*, 157. (o).

NOTE CXXXIX. p. 291. (m).

THE heir may enter and lease before admission (see *ante*, 162. (x); 285. (p); and it should seem that of consequence the husband of the heiress might do so. (See *ante*, 289. N. CXXXVI.) But it must be here understood of a lease which is warranted by the custom *without* licence; for if the lord grant the husband such licence, it might amount to an admittance, and so be without the intent of the case.

NOTE CXL. p. 291. (n).

DEBT or *indebitatus assumpsit* will lie for a fine. See *Dougl.* 727. and notes. 3 *Burr.* 1717. and *post.* 308. (w).

And such action is not within the statute of limitations. See *ante*, 178.

NOTE

NOTE CXLI, p. 292. (p).

THE lord cannot compel the heir to accept the copyhold; he can only make proclamation for him to come in and be admitted, and if he do not claim within the time prescribed by the law or custom, he may seize the lands: And see the case of *Clayton v. Cookes*, 2 *Mk.* 449. and also 3 *Pr. Wms.* 151.

In some manors, where the custom is for lands to descend after the manner of gavelkind, it often occurs in practice that the heir will not accept his portion, as not being worth the fines and fees: The estate becomes at length so divided and subdivided as to be frequently frittered into trifles, and the share of the individual unworthy of acceptance under the accustomed dues.

If the heir declines admission, there can of necessity be no fine payable to the lord; since admission is the cause of the fine. See *ante*, 218.

Without entering into the controversy whether copyholders were, or were not, originally *villains* (see *ante*, 156. N. LXVII.); yet we may here observe, that persons of that order of men were once in so abject a slavery, even in this island, and that long after the Norman æra, as to hold lands absolutely at the will of their lord, without the power of quitting them but by his permission. See 1 *Bl. Law Tracts*, 119. &c. 2 *Bl. Comm.* 93. ch. 6. and see also *Sir Tho. Smith's Commonwealth*, b. 3. c. 10.

There were others who were not quite so dependent upon the will of their masters, but, though they held at their will, could relinquish their lands if they chose to do so. *Ibid.* and see *Stuart's Diff.* p. 5. l. 2. p. 283.

There

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There was yet a third class who enjoyed greater privileges, and who could not have been amoved from their tenancies while they performed their services and returns. 1 *Bl. Traets*, 122, &c.

NOTE CXLII. p. 292. (g).

For otherwise the lords might alien as often as they pleased, and so oppress the tenants by the multitude of fines. See *Co. Litt.* 59. b. and the case of the Duke of Somerset *v.* France & *al.* 1 *Strange*, 654.

The custom can therefore be only supported when the change of the lord is by the act of God.

NOTE CXLIII. p. 292. (r).

It should seem that no fine whatever can be due from the copyholder of common right. It appears, even on admission, to be dependant upon custom. In many manors there is no fine due on the admission of an heir-at-law. See 3 *Durnf. and East*, 162. *Kitsb.* 103. b. *Dougl.* 725, &c. 1 *Freem.* 496. pl. 670.

NOTE CXLIV. p. 293. (t).

It should seem from the reason of the thing, that an infant became capable of forfeiting when he was out of ward. At that time he was necessarily supposed able to govern for himself, and therefore answerable for his acts. *Sir Edw. Coke* says (*Copyb.* f. 59.), "An infant, that is under the age of fourteen, is unable to forfeit his copyhold, because he wanteth discretion (see *Litt.* f. 59.); and, till then, he is to be in ward to the next of his kindred," &c. Till the age of fourteen, therefore, the management of his lands

lands was in others, whose acts could not prejudice him, nor be presumed to do injury to the lord. At fourteen he took upon himself the government of the tenements; and, of consequence, one would presume, became responsible for his acts.

But though the infant copyholder, or tenant in soccage, was out of ward at fourteen; the person who held in chivalry continued under his guardian till twenty-one. (See the *Introd.* xvii. and p. 439, &c.) Responsibility, therefore, did not attach on the military tenant till one-and-twenty. The law at length extended the age of responsibility to twenty-one, in the case of all infants. Hence there came a chasm or vacuum in the instances of tenants in soccage, and of copyholders: At fourteen they had the direction of their lands, and yet were not amenable for their acts till seven years afterwards! From causes how remote do circumstances of the first importance arise! Who could have conceived that such would have been the effect of a change of armour!

The tenant of lands held by copy, after attaining fourteen, makes a lease not warranted by the custom: What is the lord to do?—Shall he enter as for a forfeiture?—The law says, an infant under twenty-one is not bound by such lease: He may, at least, avoid it when of age. But it would be replied, Is it not a lease till he does avoid it?—Our author therefore says, That it seems the lord may enter, as for a forfeiture, during the nonage, and hold till the infant disaffirm the lease. But it should seem, from the observation of *Lord Mansfield*, in the case of *Zouch d. Abbot v. Parsons* (3 Burr. 1807, 8.), that as, in case the lease here made by the infant should be deemed good till avoidance, the estate would be subject to forfeiture; such

such lease should be considered, not as *voidable* only, but as absolutely void *ab initio*. And it should therefore seem, that the lord cannot be justified in entering at all.

As the privilege of the infant of avoiding or affirming his acts when of age, is given him by the law for *his benefit*, it must be evident that the reasoning of *Lord Mansfield* was just. There could be no advantage to the infant in considering this lease as voidable only, and so preserving an option when of age. Should he affirm the lease, it would immediately be a forfeiture of his copyhold; and the lord would have nothing to do but to retain the lands. If, therefore, there could be no benefit from affirming the lease, where is the utility of his option? If his only advantage would be in its avoidance, why should the law not consider it as *void*? Its only reason for deeming a lease voidable is for the benefit it may yield to the infant, but here no benefit can arise.

NOTE CXLV. p. 294. (u).

It can only be done without eventually; *i. e.* in case the lord refuse the condition stipulated. An option is given him; he may accept the ten years rent, and so grant his licence.

NOTE CXLVI. p. 295. (w).

BUT the position, that a surrender is to be construed liberally, and not as a deed; was denied by *Holt*, C. J. who said that the opinion in *Popham* was of no authority; for it is among the additional cases, and not reported by *Popham* himself; and there is no mention made of it in the report of the same case, in

Cro. Jac. 434. See 1 *P. Wms.* 16. Fisher and Wigg.

It was held, in the case of Fisher and Wigg (1 *P. Wms.* 14. 1 *Lord Raym.* 622. 2 *Ves.* 257.), by two justices (Turton and Gould) against *Holt*, C.J. that a surrender should be construed favourably, and not strictly as a deed at common law. And *Lord Hardwicke*, in the case of Rigden and Vallier, expressed a greater satisfaction with the arguments of the two justices, than with those of *Lord Holt* (see 3 *Atk.* 734. 2 *Ves.* 256, 7. See also 1 *Wilf.* 341. and *Cowp.* 660.): Though he seemed, in that of *Lovell v. Lovell* (3 *Atk.* 11.), to be of *Lord Holt's* opinion, that a surrender should be construed as a deed: But, in the case of *Rigden v. Vallier*, he made a distinction between words of *limitation*, and words of *regulation* or *modification* of the estate. See 2 *Ves.* 257. 3 *Atk.* 734.

The principle of Fisher and Wigg has been recognized in later cases (see *Cowp.* 660. and 1 *Wilf.* 341.); though that in *Idle v. Cooke*, is directly opposite: Which was, that a surrender should be taken as a deed. (1 *Pr. Wms.* 70. 1 *Salk.* 620. 2 *Lord Raym.* 1144; and see 2 *Atk.* 101. where it was adopted by *Wright*, J.)

In the case of *Wright d. Burrell v. Kemp* (3 *Durnf. and East*, 470.), *Lord Kenyon* said, "There is no doubt but that a surrender is considered as a common law conveyance, and is not entitled to the same favourable construction as a will: And, therefore, unless the surrenderor has used the language which will confer a legal estate, it cannot be conferred. In deeds, certain legal phrases must be used in order to create certain estates,—as the word "heirs"

to create a fee,—and “heirs of the body” to create an estate tail: But, beyond that, I would say, with *Lord Hardwicke*, that there is no magic in particular words, further than as they shew the intention of the parties.” And *Ashburnst*, J. said, “The intention of the surrenderor must prevail, unless it is contrary to any rule of law: We must collect the intention of the parties in deeds as well as in wills; to give effect to which, the word *or* may, in both cases, be equally construed into *and*.” And, accordingly, in the principal case, the court construed the word *or* into *and*, in order to effectuate the intention of the surrenderor.

And thus the law appears to be settled upon very rational grounds; and the question, on which there seems to have been such a contrariety of opinion, to be now at rest.

NOTE CXLVII. p. 295. (*).

Quere, Is not a lease made *with* licence for several years, as much an estate at common-law as a lease for one year without licence? See 3 *Leon.* 69. *pl.* 106. *Bull. N. P.* 107.

NOTE CXLVIII. p. 296. (γ).

AND if a lease be *with* licence, it may be as well in the hands of creditors as in the lessee's hands; as such lease may be legally assigned *ad infinitum*, without any new licence, See *post.* 299.

NOTE CXLIX. p. 296. (γ*).

Quere, Whether a lease with licence may not be extended, for the reasons given in the preceding

notes? Copyhold lands in general are not extendible, as otherwise a new tenant would be introduced without the consent of the lord: But, in this case, where the lease may be assigned without licence, and where the lessor continues tenant to the lord in whose hands soever the term may chance to be, does not the reason against extending them fail? But see *post*. 327. *contra*, where *Rolle* is cited. (See 1 *Roll. Abr.* 888. Execution (M), *pl.* 3.)

NOTE CL. p. 298. (z).

SEE the statute 4 *Geo.* 2. c. 28. s. 5. which gives to "all and every person and persons, bodies politic and corporate, the like remedy by distress and sale in cases of rent-seck, rents of assize, and chief-rents, payable within the time therein specified or thereafter to be created; as in rent reserved on lease." As this statute enacts so generally, that ALL persons shall have the power to distrain in case of rents-seck, without any qualification whatever, without alluding to any particular kind of property out of which such rents-seck were to issue, without referring to the questionable words, "lands, tenements, and hereditaments;" and, more especially as it is a remedial law, it should seem that copyholds are equally within its influence as freeholds are.

But note, copyholds were not within the statute 32 *Hen.* 8. c. 37. empowering executors to distrain. See *Bull. N. P.* 55—7. 2 *Esqin. N. P.* 19—23.

NOTE CLI. p. 299. (a).

THE reason is that the licence is absolutely at an end on the alienation of the manor; for it was only a *personal*

personal dispensation (*ante*, 203.): But the *lease* is not affected by such alienation, since it is equally binding in whose hands soever the manor may be. If the lessee's felling of timber, or licensing his tenant so to do, was no forfeiture *before* such alienation, it could not possibly be so *after* it, as his interest and powers continued exactly the same.

NOTE CLII. p. 299. (b).

SEE *Cro. Eliz.* 462. *pl.* 8. *acc.* But it is said that such licence may be on a condition *precedent*; because, in that case, it does not properly operate as a licence till the condition be performed. See 6 *Viner*, Copyh. (N. c), *pl.* 1. in margin, cites *Popham*, 105, 6.

NOTE CLIII. p. 299. (c).

THAT such licence would be good against the lord, see *Hutt.* 101, 2; and see *Viner*, Copyh. (N. c), *pl.* 5. and margin.

So, in case the copyholder had forfeited or surrendered, the lease would have bound the lord. See *Hutt.* and *Viner*, as above.

And these cases are with reason: For if the lease be made *with* licence, which is the act of the lord, why should he not be bound? And would it not, in the other cases, be unjust that the copyholder should, by his own act, destroy the estate he had granted? Hence it is said in *Hutton*, that a custom to defeat the term by the copyholder's surrendering up his estate, would not be good.

If a freeholder makes a lease for years, and dies without heir, the lease shall bind the lord who takes

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by escheat. *F. N. B.* 198. *F.* 221. *B.* 8 *Ca.* 45. 2. and *ante*, 34. (*b*).

NOTE CLIV. p. 300. (*d*).

BUT it has been since determined, that, by a grant of the freehold, the copyhold, though entailed, would be extinguished. 3 *Pr. Wms.* 9. *Dunn v. Green.*

NOTE CLV. p. 301. (*b*).

BUT *quære* of this? as such deed of release would, it should seem, be considered as a surrender, and operate as such. See *Touchst.* 82. 306. *Bull. N. P.* 111. *Cro. Jac.* 696. *pl.* 9. 2 *Roll. Abr.* 494. Surrender (*C*), *pl.* 1. (*G*) and (*H*); and case of Goodtitle *d. Edwards v. Bailey, Cowp.* 597; and *post.* 311, 12.

NOTE CLVI. p. 302. (*i*).

THE case in *Hutton* is that of *Blemmerhasset v. Humberstone* (p. 65.); and there is a confusion in that report: In the first part of the case it is said to have been resolved, that the copyhold *was* extinguished; and at the end, that it was agreed that the copyhold was *not* extinct, but that the lord might grant it again *de novo*. See *Sir Will. Jones*, 41. *pl.* 2.

The truth seems to be, that by the bargain and sale the copyholder's estate was determined, was relinquished or returned to the lord; but that the nature of the copyhold was not changed by such bargain and sale, so that it might again be granted by copy, as its demisable properties were not destroyed. See 4 *Co.* 31. a. *Frenche's case.* 1 *Roll. Abr.* 498.

Copyh.

Copyh. (B), pl. 2. *Cro. Car.* 521; and see also *Dougl.* 710, 720.

NOTE CLVII. p. 305. (n).

SEE *ante*, 246. N. CVII. 265. (x).

In some manors there is a custom for the person first named in grants for lives to defeat the estate of those in remainder. See *Lord Raym.* 999.

Quere, Whether the acceptance of an estate by livery, by the first taker, would not defeat them in such case. *Sed vide Raym. ubi supra*, and *ante*, 246. N. CVII.

NOTE CLVIII. p. 305. (o).

Rolle speaks of this more dubiously: He introduces it with an "*uncore semble*." (*Distress* (I), pl. 32.) Yet he says (pl. 33.), it is *clear* that he could not distrain the beasts of the copyholder had the rent been by grant, or anywise except by prescription; and see *post.* 328.

NOTE CLIX. p. 307. (q).

In *Leonard* it is said, *per curiam*, that he was tenant at will, and not a disseisor of the copyholder who had the land by descent; because he came in with the approbation of the lord. (3 *Leon.* 210. ca. 274.) He could not have been a disseisor of the lord for the reason alleged: And a copyholder, not having the freehold in him, cannot properly be said to be disseised.

And it should seem that the heir of the copyholder who died seised might have justified entering on him who was wrongfully admitted, or even on his heir; for the

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the dying seised of a copyhold will not toll an entry,
See *Gro. Jac.* 36. *pl.* 10. and *ante*, 281. N. CXXIX.

NOTE CLX. p. 308. (s).

If there be *no* custom, it is said that the guardian in foccage shall have the copyhold lands of the infant. See *ante*, 293. N. CXLIV. 2 *Roll Abr.* 40. *Gardien* (P), *pl.* 1. *Harg.* n. (13) to *Co. Litt.* 89. a. *Post.* 329; and see also 2 *Ves.* 303.

See now too the stat. 9 *Geo.* c. 29, of infant copyholders; and 3 *Burr.* 1717.

NOTE CLXI. p. 308. (t).

I. e. To his own use without account. See the cases cited in the margin. This is upon the principle, that, as the infant is incapable of doing the services, the lord should take the profits in order to find others to do them. See the *Introd.* xvii. *Watkins on the King's title as guardian of the Duchy of Cornwall.* *Cartb.* 45. and *ante*, 230, 1. 442, 3. N. C. CI.

So, the guardian in Chivalry took the profits to his own use, subject to the bare maintenance of the ward: See *Sulliv.* lect. XII. p. 123. *Harg.* n. (11) to *Co. Litt.* 88. a. It was otherwise as to a guardian in foccage; for he was accountable to the infant when of age. See *Litt.* f. 123; and *Co. Litt.* 89. a. And it should be remembered, that, as the lord has the custody of the infant only *by custom*, that custom must be strictly pursued.

NOTE CLXII. p. 310. (a).

See *Lex Cust.* ch. 35. p. 323, &c. which cites *Dyer v. Dyer*, 44 *Eliz.*

A bill

A bill will not lie in equity for an individual copyholder to be relieved against an excessive fine; it being the province of a jury at common-law to determine as to the reasonableness of it. But, in order to avoid a multiplicity of suits, a bill may be brought to settle a *general* fine, payable by all the copyholders of a manor. See 3 *Pr. Wms.* 155. *Cowper v. Clerk.*

NOTE CLXIII. p. 310. (b).

EQUITY will not relieve against a voluntary forfeiture, nor unless a compensation can be made to the lord: See the case of *Sir H. Peachy v. Duke of Somerset.* *Preced. in Chanc.* 566. 1 *Stra.* 447. S. C. 6 *Viner*, Copyh. (D. c), pl. 9. S. C. and *Ibid.* (E. d).

Or in cases where the act of the tenant is in itself indifferent, though amounting to a forfeiture at law; as in the case of a quaker refusing to take the oath of fealty, &c. See *Preced. in Chanc.* 574. and *Viner*, Copyh. (E. d), pl. 8.

NOTE CLXIV. p. 311. (g).

DOWER at common law is of those lands of which the husband was solely seised of an estate of freehold and inheritance *at any time during the coverture*: (*Litt. f.* 36.) So of dower in gavelkind-lands by the custom of Kent. (See *Robins. Gavelk.* b. 2. c. 2. p. 172.) But a widow can only claim her free-bench of copyhold-lands when her husband *dies seised*. See *Carth.* 275. 2 *Ves.* 633. and 638. 2 *Atk.* 526. *Cowp.* 481. *Post.* 321, &c.

NOTE

NOTE CLXV. p. 322. (y).

COPYHOLDS are neither within the stat. of *Hen. 8.* or *Car. 2.* as to *Wills*. They pass by the surrender; and the will is no more than a testamentary declaration of the uses on such surrender; and it will operate as such though not attested by any witnesses. See *Harg. n.* (1) and (3) to *Co. Litt.* 111. b. and 2 *Atk.* 37. *Tuffnell v. Page*, and 1 *Ves.* 225. *acc.*

NOTE CLXVI. p. 322. (z).

THAT such a custom is good, see 2 *Brownl.* 218. *Godbolt. ca.* 22. *Moore*, 123. *ca.* 268. and see also 3 *Leon.* 81. *ca.* 122. and *Brooke, Devise*, 34. See 4 *Co.* 61. a. and b. *contra*; and *Co. Copyb.* f. 35. *Trass*, 79. *dub.* And see the case of *Taylor v. Philips*, 1 *Ves.* 229. in which *Lord Hardwicke* seemed inclined to think that such a custom might be supported.

In the case of *Taylor v. Philips* the husband was present when the wife surrendered, and consequently, his consent was implied: But it has been determined that a custom for a feme covert to surrender *without* such consent is absolutely insupportable. 2 *Wils.* 1. *Stevens d. Wife v. Tyrrell*; and see *ante*, 277. N. CXXVIII.

NOTE CLXVII. p. 322. (a).

AND see *Lex Man.* 144, 5. case of *Allen v. Booth*, *acc.* Yet see the stat. 1 *Ed.* 6. c. 12. f. 17. which enacts that the wife shall not lose her dower though the husband be attainted, convicted, or outlawed (except for treason; see 5 and 6 *Ed.* 6. c. 11. f. 13.); any statute, law, usage, or custom to the contrary notwithstanding.

And

And therefore *quære* as to the case cited by our Author from *Winch*, which does not seem entitled to any credit. See *Harg. n. (5) to Co. Litt. 41. a.* See also *Hard. 434. contra.*

And note, that, in some manors, copyholds were not forfeited for felony, even before that statute; and where the heir did not lose the inheritance, the widow did not lose her dower. See *Tayl. on Gavelk. ch. 8. Robins. on Gavelk. b. 2. c. 4. p. 230.*

NOTE CLXVIII. p. 324. (e).

A WOMAN may be of the homage in a customary court; and even in a court-baron to present, &c. But she shall not sit as a judge to try issues, &c. See *2 Inst. 119. and ante, 11. N. X.*

NOTE CLXIX. p. 324. (f).

COPYHOLDERS owe no suit to the court-baron as contra-distinguished from the customary-court, nor can they act there in the capacity of suitors. The suitors to the court-baron must be *frank-tenants*. If the lord has two or more frank-tenants holding of his manor, he may oblige them to attend:—If he has not, he cannot hold such court. See *ante, 210.*

NOTE CLXX. p. 325. (b).

Who can read of such a custom without being immediately reminded of the *Retrait Feodal* and the *Retrait Lignager* on the alienation of the fief, which took place in so many countries; and indeed of the *jus retrañus* which was known to so many more?

“ In many countries (says Mr. Butler) where the tenant sells his fief, the lord has a *jus retrañus*, or
retrait

retrait feodal, by which he has a right to become himself the purchaser of the fief on reimbursing the stranger the price paid by him for the purchase of it, and the costs attending the purchase. In many countries also, the right of the heir is consulted by giving him the *retrait lignager*, by which, when a fief is sold, a relation of the vendor, within a certain degree of parentage, may entitle himself to repurchase the fief by an offer of the purchase-money, interest, costs, and expences, or, as it is termed in the writ, *Offre de bourse, deniers, loyaux courts a parfaire*." N. (1) to *Co. Litt.* 64. a. f. v. (6). See also *Dalrymp. Feodal Property*, ch. 3. f. 1. p. 88. and *post.* 326. *Kaims's Hist. Law Tracts*, tr. III. p. 112. and 443.

NOTE CLXXI. p. 327. (q).

THE fine should certainly be proportioned to the probable duration of the lives of the *cestui que vies*. The lord would, in this case, be compellable to admit the heir of the deceased tenant, according to the designation of his own grant. And though the court would not, on the application for a *mandamus* to admit, give any opinion respecting the reasonableness of the fine (see 2 *Durnf. and East*, 485.); yet, if it should be considered as unreasonable on assessment, the tenant might justify a refusal to pay it; and the court would equally interpose and aid him, as on a common admission on a strict descent.

NOTE CLXXII. p. 330. (a).

IT has been adjudged, that the statute of *Car. 2.* does not extend to copyholds. 3 *Levintz*, 395. 1 *Lord Raym.* 132. And see *Harg. n.* (16) to *Co. Litt.*, 89. a.

The

The ground of the decision in *Levintz* is stated to be the prejudice to the lord which would otherwise be occasioned, as it would infringe his privilege of appointing a guardian; or, at least, would take away the custom to appoint; with which the statute did not seem to intend to interfere. And see *Lord Raym. ubi supra*.

If there be *no* custom in a manor to appoint a guardian, we have seen that the custody of the infant's copyholds belongs to the guardian in soccage (*ante*, 308. N. CLX.); and, therefore, though the appointment by the father, under the statute of Charles the Second, should not be good against *the custom*, yet might it not be supported against the guardian in soccage, where there is no custom to interfere? (And see 2 *Wilf.* 129. *Roe d. Parry v. Hodgson*.) And, as copyholds are equally within acts of parliament as freeholds are, where no prejudice accrues either to the lord or tenant. (see *ante*, 164. N. LXXVIII.), might not this stat. be considered as embracing copyholds, where the custom is not concerned? The rights of the lord, or of the person entitled by custom to the wardship, should be protected; but the reason fails as to the guardian in soccage. However, as the guardian in soccage seems entitled to the custody of the *body*, notwithstanding the custom (see page 329.), it should seem also that the father may, by that statute, appoint a guardian to the *person* of his child, if he cannot affect his copyhold property. See the *Statute* 12 *Car.* 2. c. 24. s. 8. (2), and s. 9.

NOTE CLXXIII. p. 330. (b).

Co. Copyb. s. 25. Yet it is said that, by custom, a copyholder may pay a relief. *Com. Dig. Copyh.* (K. 11),

NOTES AND ILLUSTRATIONS.

(K. 11), cites *Jones (Sir Will.)*, 133. And see 2 *Bl. Comm.* 97. ch. 6.

Perhaps these positions may be thus reconciled: If a copyholder pay a fine on his admission as heir, it would be absurd to suppose him obliged to pay his relief also: For wherein does the relief differ from the fine?—(See the *Introd.* xvi., and *ante*, 24. N. XXII. 155. N. LXVI. 163. N. LXXV.) But if he pay *no* fine on such admission *as heir*, (which is the case in many manors,) a custom for him to pay a relief may not be unreasonable.

NOTE CLXXIV. p. 330. (f).

Kitch. 122. a. 2 *Wils.* 162. acc.

Aliter of tenants-in-common; as they have several estates. See 1 *Lord Raym.* 631. 1 *Pr. Wms.* 21.

And it should seem that, in case of coparceners, the admission of one would be the admission of all; they all being but *one* tenant, and having but one freehold at common-law. See 3 *Leon.* 13. ca. 30. *Cro. Car.* 521. *Stat. Hibern.* 14 *Hen.* 3. *Bro. Coparcen.* 3. *Litt.* f. 241. *Co. Litt.* 163. b. &c.

But when one coparcener dies, the others (or the heirs of the deceased) must be admitted and pay their fines: For although coparceners *take* but one estate, they *transmit* several to their heirs. See *Calch.* 64. *Co. Copyb.* f. 56. *Traffs.* 130; and *ante*, 73.

So of tenants-in-common. *Co. Copyb.* f. 56. *Traffs.* 130.

But otherwise of joint-tenants: for when one joint-tenant dies, the others take his share, and continue in on the original admission. See *Co. Copyb. ubi sup.* *Kitch.* 122. a. *Fisher on Copyb.* 87, 88.

NOTE CLXXV. p. 331. (g).

SEE *Co. Copyb.* f. 41. The stranger having nothing, could, of consequence, surrender nothing to the lord. But if the heir *accept* an admittance, knowingly, according to such surrender, he shall be concluded; as it was his own act. This admission would be considered as a new grant, and, consequently, a relinquishment of his old estate. And, I should conceive, that if the heir *had* been admitted before the surrender by the stranger, it would have made no difference in this respect, the stranger having no more in the premises before the admission of the heir than he could have had afterwards; and the presumption against the heir would have been the same; *i. e.* that he had relinquished his old estate, and had accepted a new one.

NOTE CLXXVI. p. 332. (l).

THE grant of twenty loads of wood to be taken by the grantee out of the manor of Dale, &c. seems more nearly to resemble the fiefs *de cavena* and *de camera* than any thing else: Those were permitted at a very early period; and perhaps these grants of wood, &c. are to be supported upon the same grounds.

The fiefs *de cavena* and *de camera* were grants in the nature of pensions or corrodies, of a certain sum of money, or quantity of corn, &c. to be paid or delivered, out of the treasury or granary of the lord, to the grantees, at certain times mentioned in the grant. See *Fleta*, lib. 2. cap. 7. *F. N. B.* 230. &c. *Sullivan*. lect. vii. *Butl.* n. (1) to *Co. Litt.* 64. a. f. II. And see also *Stuart's View of Soc. in Eur.* b. 1. c. 2. f. 3. p. 42, 3.

NOTE CLXXVII. p. 334. (*w*).

“ IN respect of the damage done to his interest :” For if the forfeiture be by reason of any act of the copyholder, which is injurious only to the tenant for life, and works no disinheriton of the estate, the lord in remainder can *not* take advantage of it. See *ante*, 249. (*g*).

NOTE CLXXVIII. p. 334. (*x*).

THE courts always lean against forfeitures. But the forfeiture must, in all cases, be known to the lord, before there can be a dispensation. See *ante*, 247. (*c*).

See further of dispensation, *Com. Dig. Copyh.* (M. 8). *Viner, Copyb.* (A. d). *Fisher on Copyb.* ch. 12. 3 *Durnf. and East*, 173.

NOTE CLXXIX. p. 338. (*c*).

MR. HARGRAVE very justly remarks, that this “ Distinction in *Rolle* may be doubted, for the criterion of forfeiture of a copyhold by alienation seems to be the *actual passing* of an unlawful estate, to the lord’s prejudice : And, in the case of the feoffment, no interest can pass till livery ; nor is it strictly true that the feoffee may at any time perfect the conveyance, for it is possible that, before livery, the feoffor may revoke the power of attorney, or the attorney may die, or refuse to execute his authority :” And he directs us further to 3 *Leon.* 109. and *Godb.* 269. See n. (3) to *Co. Litt.* 59. a.

I N D E X.

A

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ERRATA & ADDENDA.

Page x. Introd. N. (1.)—*after* "Hist. of Gavelk." *add* "and see also Lord Lyttl. Hist. Hen. II. vol. i. Append. No. 1."

97. N. last line—*for* "Keham" *read* "Kelham."

340. l. 19.—*add* "& vide Matth. Westm. lib. ii. f. 6. sub ann. 1084; & f. 68. f. a. 1212. Matth. Paris, f. 9. l. 48. f. a. 1084; f. 640. l. 64. f. a. 1247. &c. 3 Lyttl. Hen. II. 337. N. to p. 114. oct. ed."

346. l. 28.—*for* "these" *read* "those."

353. N. VI. l. 3.—*read* "mediately or immediately."

360. l. 32.—*for* "grantor" *read* "grantee."

425. l. 11.—*for* "her" *read* "here."

431. N. LXXXVII. l. 5. *after* "manor" *del* (—).

N. B. It was originally intended to have given the larger Notes at the bottom of the page, but it was found impracticable by reason of the great length of many of them. The design, however, was not abandoned till the first sheet of the Introduction was through the press; and, therefore, when a note is referred to from that sheet by the *letter*, the letter of reference is not correct: Yet, as those references are so few, and the number of the *page* referred to is accurate, it is hoped that the reader will not experience much inconvenience from the circumstance.

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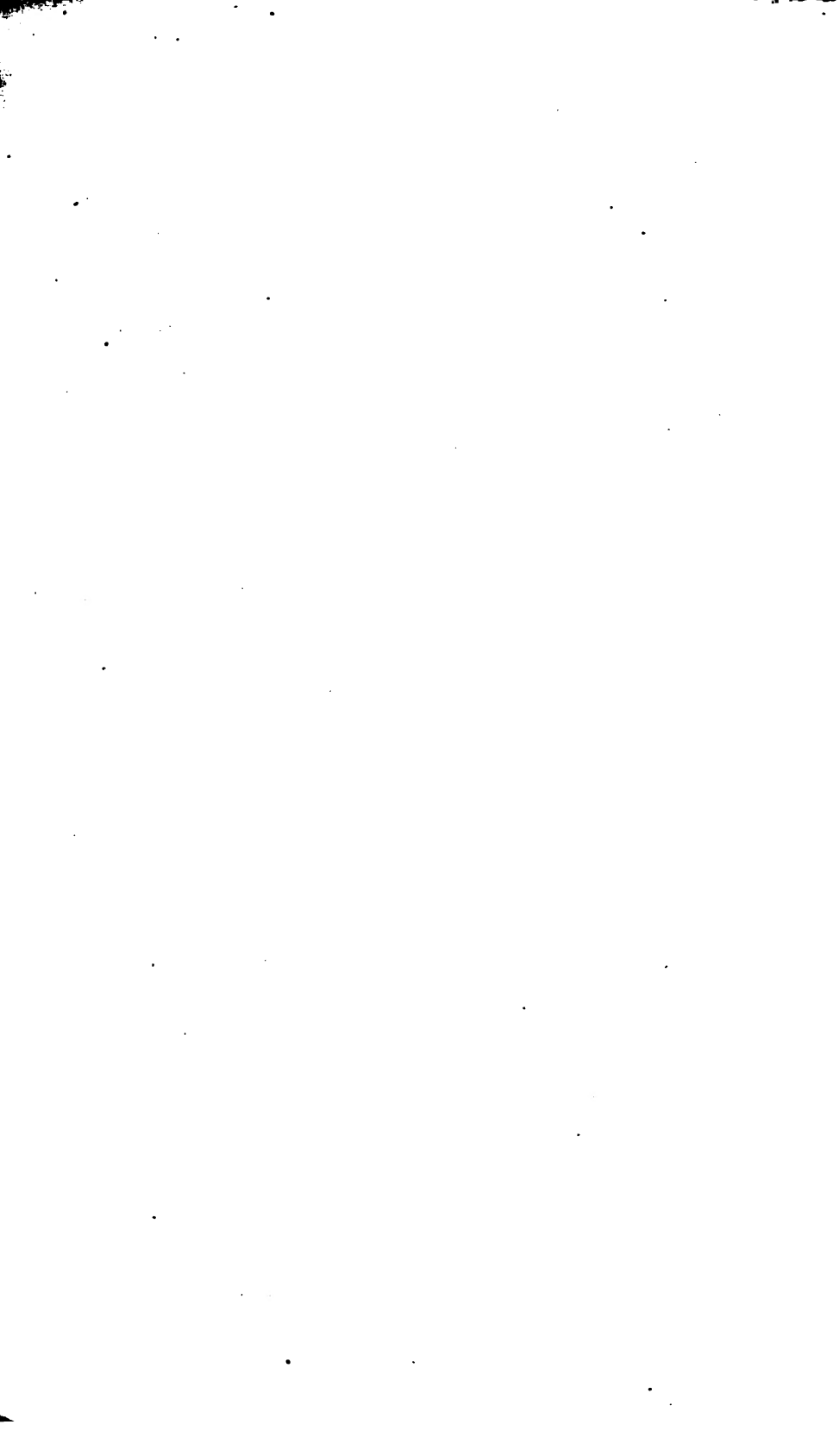
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